No. 04-1544

Supreme Court, U.S.
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In The Supreme Court of the United States

VICKIE LYNN MARSHALL,

Petitioner,

v.

E. PIERCE MARSHALL,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

KENT L. RICHLAND
Counsel of Record
DANA GARDNER ADELSTEIN
GREINES, MARTIN, STEIN & RICHLAND LLP
5700 Wilshire Boulevard, Suite 375
Los Angeles, California 90036
(310) 859-7811
(310) 276-5261 Fax

Attorneys for Petitioner

G. ERIC BRUNSTAD, JR.
Counsel of Record
BINGHAM MCCUTCHEN LLP
One State Street
Hartford, Connecticut 06103
(860) 240-2700
(860) 240-2800 Fax

Attorneys for Respondent

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

PHILIP W. BOESCH, JR.
THE BOESCH LAW GROUP
330 Washington Boulevard,
6th Floor
Marina del Rey, California
90292
(310) 578-7880

HOWARD K. STERN
LAW OFFICE OF
HOWARD K. STERN
2800 Neilson Way, Suite 1609
Santa Monica, California
90405
(310) 749-2120

Attorneys for Petitioner

THOMAS C. GOLDSTEIN
GOLDSTEIN & HOWE, P.C.
4607 Asbury Place, N.W.
Washington, DC 20016
(202) 237-7543

Attorneys for Respondent

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The following opinions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

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DOCKET OF RELEVANT DOCUMENTS

ORIGINAL FILING DATE	USDC DOCKET NO.	USDC FILING DATE	DOCUMENT TITLE	NINTH CIRCUIT EXCERPTS NO.
04/03/95[1]			Petition for Declaratory Judgment and Motion for Trust Disclosure and for Accounting of Income Earned, originally filed in case no. 272,890, Guardianship of J. Howard Marshall, II, probate court number three, Harris County, Texas by Vickie Lynn Marshall	ER 5614
08/08/95	282[2]	11/02/01	Application for Letters of Administration, originally filed in case no. 276,815, In re Estate of J. Howard Marshall, II, deceased, probate court number three, Harris County, Texas by Vickie Lynn Marshall	ER 816

[1] Some of the documents identified in this docket were originally filed in probate or guardianship proceedings in Texas state court or in the underlying adversary proceeding in the bankruptcy court. Accordingly, we have organized this docket by the original filing date of each document. For the Court's convenience, we have also identified the dates on which documents were filed in the district court and where the documents can be found in the Excerpts of Record ("ER") and Supplemental Excerpts of Record ("SER") filed in the Ninth Circuit.

[2] The entire district court is docket included in the Supplemental Excerpts of Record at pp. 12533-84.

08/14/95	56	04/09/01	Opposition to Application for Letters of Administration, originally filed in case no. 276,815-402, In re Estate of J. Howard Marshall, II, deceased, probate court number three, Harris County, Texas	ER 842
08/16/95	211	07/17/01	Application for Probate of Will and Codicil and for Appointment of Independent Co-Executors, originally filed in case no. 276,815-402, In re Estate of J. Howard Marshall, II, deceased, probate court number three, Harris County, Texas by E. Pierce Marshall	ER 836
12/20/95	211	07/17/01	Opposition and Contest of Contestant J. Howard Marshall, III to Applicant's Application for Probate of Purported Will and Codicil and to Applicant's Request for Appointment of Independent Co-Executors, originally filed in case no. 276,815-402, In re Estate of J. Howard Marshall, II, deceased, probate court number three, Harris County, Texas	ER 857

01/25/96	98	06/15/01	Chapter 11 Voluntary Petition for Vickie Lynn Marshall originally filed in U.S.B.C., case no. LA 96-12510	SER 5987
05/07/96	123	06/15/01	E. Pierce Marshall's Complaint to Determine Dischargeability of Debt, originally filed in U.S.B.C. adversary no. 96-01838	SER 6722
06/12/96	98	06/15/01	E. Pierce Marshall's Proof of Claim, Creditor, originally filed in U.S.B.C. no. 96-12510	SER 6020
06/14/96	123	06/15/01	Answer and Counterclaim By Vickie Lynn Marshall Against E. Pierce Marshall, originally filed in U.S.B.C. adversary no. 96-01838	SER 6727
07/08/96	123	06/15/01	Answer and Affirmative Defenses of E. Pierce Marshall to Counterclaim by Vickie Lynn Marshall, originally filed in U.S.B.C. adversary no. 96-01838	SER 6753
01/23/98	281	11/2/01	Amended and Consolidated Petition and Will Contest, originally filed in case no. 276,815-402, In re Estate of J. Howard Marshall, II, deceased, probate court number three, Harris County, Texas by Vickie Lynn Marshall	ER 1319

12/29/98	98	06/15/01	Debtor's First Amended Plan of Reorganization, originally filed in U.S.B.C., case no. LA 96-12510	SER 6065
03/08/99	98	06/15/01	Order Confirming Debtor's First Amended Plan of Reorganization, entered in U.S.B.C., case no. LA 96-12510	SER 6086
03/25/99	98	06/15/01	Discharge of Debtor [Vickie Lynn Marshall], entered in U.S.B.C., case no. LA 96-12510	SER 6090
10/22/99	150	06/15/01	Order Denying Motion Regarding Absence of Subject Matter Jurisdiction, entered in U.S.B.C., adversary no. 96-01838	SER 7510
11/5/99	161	06/15/01	Order Granting Summary Judgment, entered in U.S.B.C., adversary no. 96-01838	SER 7940
11/8/99	161	06/15/01	Judgment for Debtor/ Defendant, entered in U.S.B.C., adversary no. 96-01838	SER 8086
1/4/00	211	07/17/01	Plaintiff Vickie Lynn Marshall's Third Amended Consolidated Petition and Will Contest, originally filed in case no. 276,815-402, In re Estate of J. Howard Marshall, II, deceased, probate court number two, Harris County, Texas	ER 2838

9/–/00	283	07/17/01	Plaintiff Vickie Marshall's Preliminary Jury Questions and Instructions, originally filed in case no. 276,815-402, In re Estate of J. Howard Marshall, II, deceased, probate court number two, Harris County, Texas	ER 4073
10/2/00	283	11/2/01	Reporter's Record of Opening Statements in case no. 276,815-402, In re Estate of J. Howard Marshall, II, deceased, probate court number two, Harris County, Texas	ER 4105
10/6/00	169	06/15/01	Amended Memorandum of Decision Following Trial, entered in U.S.B.C. adversary no. 96-01838 [*In re Marshall*, 253 B.R. 550 (C.D. Bankr. October 6, 2000)]	ER 3047
11/21/00	170	06/15/01	Supplemental Memorandum of Decision Following Trial, entered in U.S.B.C. adversary no. 96-01838 (C.D. Bankr. November 21, 2000)	ER 3239
12/29/00	172	06/15/01	Order on Motion for Entry of Judgment, entered in U.S.B.C. adversary no. 96-01838 [*In re Marshall*, 257 B.R. 35 C.D. Bankr. (December 29, 2000)]	ER 3363

12/29/00	172	06/15/01	Final Judgment, entered in U.S.B.C. adversary no. 96-01838	SER 8730
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02/09/01	227	08/16/01	Amended Affirmative Claims of Marshall Family Defendants Against Vickie Lynn Marshall, originally filed in case no. 276,815-402, In re Estate of J. Howard Marshall, II, deceased, probate court number two, Harris County, Texas	SER 8609
02/28/01	173	06/15/01	Excerpts of Transcript of Hearing on Charge Conference in case no. 276,815-402, In re Estate of J. Howard Marshall, II, deceased, probate court number two, Harris County, Texas	SER 8492

03/07/01	33	03/14/01	Charge of the Court [Jury Questions] in case no. 276,815-402, In re Estate of J. Howard Marshall, II, deceased, probate court number two, Harris County, Texas	SER 5793
06/20/01	175	06/20/01	Amended Order Regarding Subject Matter Jurisdiction And Whether The Tortious Interference Counterclaim Is Core or Non-Core [*In re Marshall*, 264 B.R. 609 (C.D. Cal. June 20, 2001)]	ER 3925
12/07/01	388	02/14/02	Second Modified Final Judgment, entered in case no. 276,815-402, In re Estate of J. Howard Marshall, II, deceased, probate court number two, Harris County, Texas	ER 4706
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03/07/02	397	03/07/02	Findings of Fact and Conclusions of Law [*In re Marshall*, 275 B.R. 5 (C.D. Cal. March 7, 2002)]	ER 5390
03/07/02	400	03/07/02	Judgment of District Court	ER 5385

08/11/03			Substituted Corrected Opening Brief of Appellant E. Pierce Marshall, filed in Ninth Circuit	
10/09/03			Transcript of Oral Arguments in the United States Court of Appeals for the Ninth Circuit, excerpts pp. 34-39, 63-64	
12/30/04			*In re Marshall*, 392 F.3d 1118 (9th Cir. December 30, 2004)	

NO. 272,890

GUARDIANSHIP OF	)(	IN THE PROBATE
	)(	COURT
J. HOWARD MARSHALL, II	)(	NUMBER THREE (3) OF
AN INCAPACITATED	)(	HARRIS COUNTY,
ADULT PERSON	)(	TEXAS

PETITION FOR DECLARATORY JUDGMENT
AND
MOTION FOR TRUST DISCLOSURE AND FOR ACCOUNTING OF INCOME EARNED

(April 1995)

TO THE HONORABLE JUDGE OF SAID COURT:

VICKI LYNN MARSHALL a/k/a ANNA NICOLE SMITH ("Movant") files this Petition for Declaratory Judgment and Motion for Trust Disclosure and for Accounting of Income Earned and would show the Court as follows:

I.

Movant is the lawful and legal wife of J. HOWARD MARSHALL II, is a resident of Harris County, and is represented by Counsel, SUZANNE P. KORNBLIT, JOHN HUTCHISON III, LENARD LEEDS and STEVEN A. MORELLI, who file this Motion in her behalf.

Movant complains of E. PIERCE MARSHALL ("Respondent") in his individual capacity, his capacity as Co-Trustee of the J. HOWARD MARSHALL II LIVING TRUST, in his purported capacity as agent for J. HOWARD MARSHALL II under Power of Attorney dated July

13, 1994 and in his capacity as Temporary Guardian of the Person of J. HOWARD MARSHALL II. Respondent resides at 5917 Club Oaks Drive, Dallas, Texas 75248 and may be served with citation there by certified mail. In addition, Respondent may be served through his attorney of record JOSEPH HORRIGAN, HORRIGAN & GOEHRS, 909 Fannin #1000, Houston, Texas 77010, pursuant to Section 34 of the Texas Probate Code.

II.

This Court has Jurisdiction over this proceeding pursuant to Sections 5(d) and 5A(c) of the Texas Probate Code, Sections 37.005, et seq., of the Texas Civil Practice and Remedies Code, and Section 115.001(d) of the Texas Trust Code.

III.

Venue of this cause is in Harris County pursuant to sections 15.001 and 15.031 of the Texas Civil Practice and Remedies Code, and Section 115.002(d) of the Texas Trust Code.

IV.

Movant would show that although she and her attorneys have made repeated requests for support for herself and for her husband to Respondent by and through his attorneys and has requested a copy of the J. HOWARD MARSHALL II LIVING TRUST, Respondent and his attorneys have refused to provide same, leaving Movant with no alternative but to seek judicial intervention on behalf of herself and her husband and herein requests this

Court compel Respondent to disclose the Trust instrument in order that the Court may judicially determine whether or not J. HOWARD MARSHALL II is indeed a beneficiary of such Trust and thereby entitled to have his and Movant's lawful debts and support paid from the Trust.

J. HOWARD MARSHALL II is currently ailing and recuperating from pneumonia; said condition precludes his direct intervention in this matter. The actions of Respondent as illustrated herein have been in conflict with his father's interests and evidence Respondent's intent to protect his own interests ahead of those of his father and of his father's lawful wife.

V.

On June 27, 1994 Movant married J. HOWARD MARSHALL, II in a formal wedding ceremony performed in Houston, Texas. Movant would show the Court that after Movant and J. HOWARD MARSHALL were married, Respondent commenced a course of conduct which continues even today and which has been designed to tortiously interfere with Movant's statutory property rights under Texas law entitling her to support from her husband during their marriage. Such course of conduct on the part of Respondent was done with malice and included the following actions:

1. On July 13, 1994 Respondent caused to be prepared and executed an Act of Procuration (copy attached as Exhibit 1) whereby J. HOWARD MARSHALL II gave Respondent a durable power of attorney, the right to make his health care decisions, and nominated Respondent as his Guardian. The designation of Guardian does not

comply with Texas law, Texas Probate Code Section 679.

2. On July 13, 1994 Respondent caused to be prepared and executed, an amendment to the J. HOWARD MARSHALL II LIVING TRUST. (see 1st sentence in the copy of a Deed attached as Exhibit 2)

3. On July 15, 1994 Respondent caused to be prepared and executed the Deed (previously mentioned as being attached as Exhibit 2) whereby J. HOWARD MARSHALL II became obligated to the J. HOWARD MARSHALL II LIVING, TRUST in the amount of $960,000.00. We surmise J. HOWARD MARSHALL II believed that this deed gave him personal title to the property he and Movant knew as "the ranch" and the right to "gift" the ranch to Movant.

4. On or about September 24, 1994, J. HOWARD MARSHALL II signed an Act of Donation with Acceptance attempting to gift to Movant a 1992 Mercedes, 1000 shares of stock in Compaigne Victoire Inc., a Texas Corporation, and the ranch.

Movant would show that if such Power of Attorney, Deed, Trust Amendment, and Act of Donation with Acceptance were executed by J. HOWARD MARSHALL II, the signature of J. HOWARD MARSHALL II was obtained through the actual or constructive fraud of Respondent or by virtue of undue influence exercised upon J. HOWARD MARSHALL II by the Respondent. Movant would further show that J. HOWARD MARSHALL II had promised Movant he would put the ranch in her name unencumbered, and that J. HOWARD MARSHALL II trusted Respondent who was in a confidential and fiduciary relationship with him as Co-Trustee of the J. HOWARD

MARSHALL II LIVING TRUST and co-owner, shareholder, director and officer of Marshall Petroleum Inc. which is purportedly the major asset in the J. HOWARD MARSHALL II LIVING TRUST. Movant would further show that at the time Respondent induced his father to obligate himself for $960,000.00 to purchase the ranch from the J. HOWARD MARSHALL II LIVING TRUST, Respondent as Co-Trustee of that trust had personal knowledge of the finances of J. HOWARD MARSHALL II, and intended to obstruct the wishes of J. HOWARD MARSHALL II to own his ranch unencumbered and in fee simple so that he could gift it to Movant.

5. On or about September 26, 1994, J. HOWARD MARSHALL II purchased jewelry as a gift for Movant and wrote a check to Harry Winston's. Respondent under the above mentioned Power Of Attorney, as Co-Trustee of the J. HOWARD MARSHALL II LIVING TRUST, and as Temporary Guardian of the Person of J. HOWARD MARSHALL II still as of this date, has failed to honor his father's check. Movant on good faith returned the jewelry to Harry Winston on or about March 7, 1995. However both she and J. HOWARD MARSHALL II have been sued by Harry Winston and are still liable for the purchase price, interest, and attorney fees.

Movant would show that during her courtship with J. HOWARD MARSHALL II and after their marriage, her husband gave generous gifts to Movant in accordance with his means while Movant gave him in return her devotion and affection. Their lifestyle together, both before and after their marriage was lavish, J. HOWARD MARSHALL II providing, and in fact insisting upon meeting Movant's every need and desire. Movant would further show that J.

HOWARD MARSHALL II relied on Respondent who was his Co-Trustee, had no reason to believe that he did not have sufficient assets to pay for the ranch, for the jewelry purchase, and for other necessities for himself and for his wife.

VI.

At or about the time Movant and J. HOWARD MARSHALL II received notice of insufficient funds regarding, the check J. HOWARD MARSHALL II had negotiated at Harry Winston's they also learned J. HOWARD MARSHALL II had no funds in the bank accounts he had been using.

In December of 1994 J. HOWARD MARSHALL II became ill and was hospitalized for pneumonia, his heart having been broken by the trickery and deceit of his son. Up until such time J. HOWARD MARSHALL II became ill in December of 1994 he attended his duties as Chief Operating Officer of Marshall Petroleum Inc. daily, with no thought that his bank accounts were depleted.

Respondent as Co-Trustee of the J. HOWARD MARSHALL II LIVING TRUST owes the highest fiduciary duties to J. HOWARD MARSHALL II, especially if, as has been suggested by attorneys representing J. HOWARD MARSHALL II and E. PIERCE MARSHALL, Respondent is the sole beneficiary of the J. HOWARD MARSHALL II LIVING TRUST upon the eventual death of J. HOWARD MARSHALL II. Respondent's conflict of interest is obvious. Respondent has breached the fiduciary duties owed to J. HOWARD MARSHALL II under the J. HOWARD MARSHALL II LIVING TRUST and Respondent as attorney in fact for J. HOWARD MARSHALL II has

caused J. HOWARD MARSHALL II to breach his statutory duty of support owed to his wife by, among others: failing to pay expenses of J. HOWARD MARSHALL II, failing to make income distributions to J. HOWARD MARSHAL II and to Movant, and failing to pay taxes, insurance and utilities on properties J. HOWARD MARSHALL II gifted to Movant before and during their marriage. As a result of such breach, J. HOWARD MARSHALL II and Movant who is entitled to a community share of income from the trust have been damaged.

VII.

Movant would show that J. HOWARD MARSHALL II represents himself to be a man of quite substantial means and was recognized by *Forbes* magazine as one of the wealthiest men in America. Since October, Respondent acting as both Co-Trustee of the J. HOWARD MARSHALL II LIVING TRUST and as agent of J. HOWARD MARSHALL II under the aforementioned Power of Attorney has seen fit to cut off support necessary to maintain marital bills and expenses of Movant and J. HOWARD MARSHALL II. Thus, one of the wealthiest men in America and his wife, have had the water turned off in residences for non-payment, and have received delinquent notices regarding taxes, insurance and various utilities. Respondent has informed Movant by and through his attorneys that there are no available funds for these bills and/or for Movant's expenses which J. HOWARD MARSHALL II had willingly and generously provided to Movant through their courtship and through the first months of their marriage. Movant believes J. HOWARD MARSHALL II would want to provide for her support, that their marriage is sound and that Respondent's selfish

withholding of the payment of their bills is a breach of his fiduciary duty under both the J. HOWARD MARSHALL II LIVING TRUST and the aforementioned Power of Attorney. Movant seeks disclosure of the J. HOWARD MARSHALL II LIVING TRUST in order that this Court may judicially determine its validity and the obligations of the trust to provide for the support of J. HOWARD MARSHALL II and Movant.

Texas Family Code Section 4.02 obligates each spouse to support the other spouse. It is well established Texas law, and practice that if no community funds are available, the spouse having separate funds is required to use them for community living expenses. Income received by a married beneficiary on the trust corpus to which the beneficiary is entitled is community property. *Mercantile Bank at Dallas v. Wilson,* 279 S.W. 2d 650, 654 (Tex.Civ.App. Dallas 1955, writ ref'd n.r.e.) Trust income which a married beneficiary does not receive, and to which he has no claim other than an expectancy interest in the corpus, is not community property. *Matter of the marriage of Long*, 542 S.W. 2d 712, 718 (Tex.Civ.App. – Texarkana 1976, no writ) Movant insists that she be given an opportunity through disclosure of the J. HOWARD MARSHALL II LIVING TRUST to ascertain whether or not J. HOWARD MARSHALL II is entitled to a possessory interest in the trust corpus whereby not only the income, but also the corpus of said trust is available for her and her husband's expenses.

VIII.

Because of Respondent's wrongful conduct as above alleged, Movant will show that Respondent has breached his

fiduciary duty he has to J. HOWARD MARSHALL II and to Movant who is the spouse of J. HOWARD MARSHALL II. Movant would show that Respondent's actions constitute material violations of the terms of the J. HOWARD MARSHALL II LIVING TRUST and which have resulted in material financial loss and expense to the trust, to the properties within the trust, to Movant and to J. HOWARD MARSHALL II. Such material breaches and violations by Respondent constitute grounds to require Respondent's removal as Trustee; Movant recognizing her own potential conflict, requests this Court Order the Power of Attorney be revoked and asks this Court to remove Respondent as Co-Trustee of the J. HOWARD MARSHALL II LIVING TRUST under authority of Section 113.082 of the Texas Trust Code and requests the appointment of an independent third Party to replace Respondent. Upon such removal, Respondent should be required to formally account for all property ever held by him as Co-Trustee of such trust and the Court should order the delivery of J. HOWARD MARSHALL II's assets in the J. HOWARD MARSHALL II LIVING TRUST to the Court so that the funds may be administered under Court supervision.

IX.

Movant demands Respondent see that the Harry Winston jewels are returned to her and paid for by the J. HOWARD MARSHALL II LIVING TRUST and/or that she be indemnified in the lawsuit on that matter. Movant demands Respondent provide maintenance and support for J. HOWARD MARSHALL II and for herself. Because under Texas community property law, Movant would be entitled to 1/2 of the earnings from the separate estate of her husband from their date of marriage, Movant seeks an

accounting and a judicial determination of the community amount she is entitled to receive and asks this Court to impose a constructive trust upon assets she is entitled to and to which Respondent has in his control.

In the alternative, a justiciable question exists as to the true ownership of the assets composing the J. HOWARD MARSHALL II LIVING TRUST and Movant requests that this Court enter a declaratory judgment determining rightful ownership of the assets in the J. HOWARD MARSHALL II LIVING TRUST.

X.

To the extent any of the aforementioned actions of Respondent constitute bad faith in the performance of his duties, breach of trust, gross neglect or self dealing, Movant requests that Respondent be personally surcharged for all losses and/or unreasonable expenses of the Trust, including but not limited to, attorneys' fees and trustees' fees from his neglect, self dealing and breach of trust, if any is so found by this Court. Respondent has breached his fiduciary duty by engaging in self dealing and by the manner in which he has managed the trust assets. Respondent's actions have been intentionally adverse to J. HOWARD MARSHALL II and have constituted wrongful self-dealing, bad faith, misappropriation of trust assets, and reckless indifference toward the interest of the beneficiary, all of which entitles Movant the requested surcharge for actual and exemplary damages.

XI.

Pursuant to Section 37.009 of the Texas Civil Practice and remedies Code, Movant requests the Court award her

costs of court and reasonable attorneys' fees for bringing this action. In a suit in which legal assistance is required to protect a spouse's marital rights, the spouse may collect attorney fees out of the community property or, if necessary, out of the other spouse's separate property. *Jindra v. Jindra*, 267 S.W. 2d 287 (Tex.Civ.App. – San Antonio 1954) *Swenson v. Swenson*, 45 S.W. 2d 424 428 (Tex.Civ.App. – Houston [1st Dist.] 1971, no writ) Additionally, Movant requests Respondent pay his proportionate share of fees and expenses and costs incurred in the trial court, court of appeals, or any appeal to the Texas Supreme Court.

WHEREFORE, PREMISES CONSIDERED, Movant requests that the Court enter judgment as follows:

(1) Enter an Order directing Respondent to disclose to Movant and to this court, the J. HOWARD MARSHALL II LIVING TRUST so that J. HOWARD MARSHALL II may be declared a beneficiary of the trust; and/or

(2) Enter an Order directing Respondent to pay reasonable and customary support to J. HOWARD MARSHALL II and to Movant, in the standard to which J. HOWARD MARSHALL II and Movant VICKIE LYNN MARSHALL a/k/a ANNA NICOLE SMITH have been accustomed; and/or

(3) After final trial, terminate the Power of Attorney and remove Respondent as Trustee of the Trust; and/or

(4) Enter an Order surcharging Respondent for the actual and exemplary damages sought herein and proven at final trial, including, but not limited to, all unreasonable trustee and attorneys' fees; and/or

(5) Tax Movant's fees as costs that were reasonable and necessary attorneys' fees and costs incurred in this case, from Respondent individually, plus fees and expenses for any appeal to the Court of Appeals and/or Supreme Court of Texas by any party; and/or

(6) Grant Movant such other and further relief, both general and special, at law and in equity, to which she may show herself justly entitled.

Respectfully Submitted,

KORNBLIT & ASSOCIATES

/s/ Suzanne P. Kornblit
SUZANNE P. KORNBLIT
TBL #11683600
3131 Eastside #324
Houston, Texas 77098
(713) 524-2430
(713) 524-2423 fax

/s/ John Hutchison (swp, spk)
JOHN HUTCHISON III
TBL# 1035600
1177 West Loop South, #1675
Houston, Texas 77027
(713) 850-9820
(713) 552-0999 fax

LEEDS & MORELLI, ESQS.

/s/ Lenard Leeds (swp, spk)
LENARD LEEDS
One Old Country Road,
Suite 282
Carle Place, N.Y. 11514
(516) 873-9550
(516) 747-5024 fax

/s/ Steven Morelli (swp, spk)
STEVEN A. MORELLI
One Old Country Road, Suite 282
Carle Place, N.Y. 11514
(516) 873-9550
(516) 747-5024 fax

BIEGENZAHN WEINBERG
STEPHEN F. BIEGENZAHN (No. 60584)
JOEL B. WEINBERG (No. 101466)
21031 Ventura Blvd., Suite 905
Woodland Hills, California 91364-2203
(818) 594-8822

KINSELLA, BOESCH, FUJIKAWA & TOWLE, LLP
PHILIP W. BOESCH, JR., State Bar No. 60608
MARK KESTER BROWN State Bar No. 89467
1901 Avenue of the Stars, Seventh Floor
Los Angeles, California 90067-6009
(310) 201-2000

SCHECHTER & MARSHALL, L.L.P.
DIANA E. MARSHALL
J. TYNAN KELLY
3200 Travis
Houston, Texas 77008
(713) 757-7811

Attorneys for Debtor, Defendant and Counterclaimant

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

In re VICKIE LYNN MARSHALL, Debtor.	) CASE NO. LA 96-12510-SB)) Chapter 11)) Adversary No. 96-01838 SB
E. Pierce Marshall, Plaintiff, v. Vickie Lynn Marshall, Defendant.	) ANSWER AND COUNTER-) CLAIM BY VICKIE LYNN) MARSHALL AGAINST E.) PIERCE MARSHALL UNDER) 11 U.S.C. §§544, 550, AND) APPLICABLE LAW)) (Filed June 14, 1996)
Vickie Lynn Marshall, Counterclaimant, v. E. Pierce Marshall, Counterdefendant.	) STATUS CONFERENCE) DATE: July 10, 1996) TIME: 10:00 a.m.) CTRM: 1575) Roybal Federal Building) 255 East Temple Street) Los Angeles, CA 90012

* * *

FOURTH COUNTERCLAIM

(Tortious Interference With Inheritance)

35. Mrs. Marshall incorporates by reference paragraphs 1 through 25, as though fully set forth.

36. By the promises made to Mrs. Marshall, by the intentions expressed by Mr. Marshall, it is clear that Mrs. Marshall had expectancies of inheritance and/or gift that were realistic and substantial.

37. Debtor is informed and believes that Counterdefendant intentionally interfered with that expectancy by engaging in a concerted campaign to undermine Mrs. Marshall's rights and Mrs. Marshall's marriage to her Husband, by effectively imprisoning Mr. Marshall against his wishes, by surrounding Mr. Marshall with hired agents who reported to the Younger Son, by stationing armed guards to prevent access and personal contact between the Husband and Wife, by cutting off support and obstructing the expressed wishes of Mr. Marshall, by deceiving Mr. Marshall, by attempting to undo gifts made by Mr. Marshall, by preparing documents and by ostensibly making transfers of property of Mr. Marshall which were inconsistent with his expressed wishes and desires, by making misrepresentations against Mrs. Marshall, by cutting off income to Mr. and Mrs. Marshall, by cutting off payments to professionals retained to assist Mrs. Marshall, by suborning false testimony against Mrs. Marshall, by abusing legal process, and by other actions that shall be proven at trial. Mrs. Marshall is informed and believes such interference was tortious, and marked by fraud, duress and undue influence.

38. As a proximate result of such interference, Debtor has been damaged in an amount to be proven at trial but which amount Debtor believes exceeds $300 million.

39. Mrs. Marshall is informed and believes that at all pertinent times the Counterdefendant has acted toward her in an outrageous, despicable, and vindictive manner, with personal hatred, malice and ill-will, in conscious disregard of Mrs. Marshall's rights, with an intentional purpose to injure, vex and annoy her, all for the Younger Son's financial gain, such that the Counterdefendant should pay

punitive damages in an amount and of a magnitude similar to or greater than the financial gain seized by him.

* * *

NO. 276,815-402

IN RE ESTATE OF J. HOWARD MARSHALL, II DECEASED	§	IN THE PROBATE COURT
J. HOWARD MARSHALL, III, ET AL.,	§	NUMBER TWO (2) OF
V.	§	
ROBERT S. MACINTYRE, ET AL.	§	HARRIS COUNTY, TEXAS

PLAINTIFF VICKIE LYNN MARSHALL'S THIRD AMENDED CONSOLIDATED PETITION AND WILL CONTEST

(Filed Jan. 4, 2000)

Plaintiff Vickie Lynn Marshall ("Plaintiff" or – "Vickie" or "Mrs. Marshall") files this her Third Amended Consolidated Petition and Will Contest complaining of the conduct of the Defendants named herein and in support thereof would respectfully show the Court the following:

PARTIES

1. Plaintiff and Contestant Vickie Lynn Marshall, also known as Anna Nicole Smith) has previously appeared in this docket and has an ancillary proceeding under No. 276, 815, and No. 276, 815-402 and other dockets with which consolidation has been requested and understood to have been granted.

2. Defendant Robert S. MacIntyre, Jr., is sued in his capacity as the temporary administrator of the estate of J. Howard Marshall II, and he has appeared in this action.

3. Defendant E. Pierce Marshall ("Pierce Marshall") is an individual who maintains a place of business in Harris County, Texas, and who has appeared herein. Pierce Marshall is sued as an individual, and is also sued with respect to his present or former capacities as trustee and/or alter ego or dominant shareholder of the following entities: the J. Howard Marshall II Living Trust and all successors and assigns thereto as the purported agent or "attorney in fact" for J. Howard Marshall II under one or more powers of attorney purportedly executed by J Howard Marshall II before his death: as trustee of the Marshall Museum and Library (formerly Marshall Museum of Racing) of Racing (ad [sic] all successors and assigns thereto): Marshall Petroleum Incorporated (also known as "Trof, Inc."). Marshall Oil & Gas L.L.C.: as trustee of the Marshall Grandchildren's Trust for the benefit of E. Pierce Marshall, Jr., as trustee of the Marshall Grandchildren's Trust for the benefit of Preston Marshall: as Trustee of the Marshall Petroleum, Inc. Stock Holding Trust; as Trustee of the Bettye B. Marshall Living Trust (also sometimes referred to as the Bettye B. Marshall Estate Trust: as Trustee of the J. Howard Marshall II, Marital Trust Number Two as Trustee of the E. Pierce Marshall Family Trust created under the Bettye B. Marshall Living Trust Indenture dated October 30, 1990. Pierce Marshall has entered an appearance in this case in all of the above mentioned capacities.

* * *

JURISDICTION AND VENUE

14. This Court has jurisdiction pursuant to sections 5 and 5A of the Texas Probate Code. The matter is related to the estate of J. Howard Marshall II and the administration thereof, which is pending in said Court. Venue is

proper because of the matters described herein arose in part in Harris County, Texas.

* * *

Tortious Interference and Conspiracy To Commit Tortious Interference

62. As discussed in greater detail herein and above. Defendants Pierce Marshall, Edward Hunter, Finley Hilliard, and their co-conspirators tortiously interfered with *inter alia*. Mr. Marshall's promises to Vickie. Mrs. Marshall's expectancy of an inter-vivos gift from Mr. Marshall and with Mrs. Marshall expectancy of a testamentary gift from Mr. Marshall. As noted above, Defendants acted to prevent Mrs. Marshall from receiving gifts and inheritance that she otherwise would have received from Mr. Marshall by their acts of fraud, misrepresentation, deceit, duress, undue influence, self dealing, breach of fiduciary duty, and other tortious means as more fully identified above. Defendants not only acted individually to tortiously interfere with Mrs. Marshall's expectancy in these matters, but these defendants also acted jointly to bring about this tortious interference with Mrs. Marshall's expectancy. Defendants acted jointly and in a civil conspiracy to bring about this tortious interference by entering into a meeting of the minds with regard to these acts of tortious interference, and committing one or more actions in furtherance of this conspiracy to tortiously interfere with Mr. Marshall's promises and agreements, Mrs. Marshall's expectancy of receiving an inter-vivos gift from Mr. Marshall, and Mrs. Marshall's expectancy of receiving a testamentary gift.

63. Although the transactions taken by these co-conspirator defendants in furtherance of their joint purpose of tortiously interfering with Mr. Marshall's promises, Mrs. Marshall's expectancy of inter-vivos gifts and testamentary gifts from Mr. Marshall, transactions taken in furtherance of this conspiracy are more fully described in this Petition above. The following are a list of transactions designed by, prepared by, documented by, participated in, or consented to by these various defendants in furtherance of this civil conspiracy.

- The gift of 2,146 MPI shares to Pierce on August 24, 1993
- The bargain sale of 2,044 MPI shares to Pierce on August 24, 1993
- The sale of 35,466 MPI shares to Pierce on August 25, 1993
- The gift of 47,288 MPI shares to a Grantor Retained Annuity Trust (GRAT) on August 25, 1993
- The redemption of 14,065 MPI shares on August 26, 1993
- The gift of a portion of the promissory note received from Pierce for the 35,466 MPI share sale to a Charitable Remainder Annuity Trust (CRAT=1) on November 30, 1993
- The attempted gift of another portion of the promissory note received from Pierce for the 35,466 MPI share sale to a second Charitable Remainder Annuity Trust (CRAT=2) on December 28, 1993 (failed to complete)
- The gift of 13 MPI shares each to Pierce's wife, Elaine, and trusts for each of Pierce's two sons. E. Pierce, Jr. and Preston, on December 28, 1993

- The sale of 153 MPI shares to Pierce on June 16, 1994
- The conversion of the Living Trust from a revocable trust required to pay Mr. Marshall all its income at least quarterly (unless directed otherwise by Mr. Marshall) to an irrevocable discretionary income trust on July 13, 1994
- The provision, by Act of Procuration, of a Durable Power of Attorney with terms that make it extremely difficult to revoke, over Mr. Marshall's affairs to Pierce on July 13, 1994
- The award of 24,653 shares of The Electron Corp. stock (subject to certain restrictions), owned by the Living Trust and valued at more than $240,000, to Pierce as a trustee fee on July 15, 1994
- Mr. Marshall's resignation as co-trustee (with Pierce) of the Living Trust and his replacement by Hilliard on August 2, 1994
- The Renunciation of Mr. Marshall's representative's rights to distributions for administrative costs from the Living Trust after his death on December 28, 1994
- The declaration that Mr. Marshall is unfit to remain on MPI's Board because he is "temporarily incapacitated," thus leaving Pierce as its sole director, on May 26, 1995
- The redemption of 63,051 MPI shares for a private annuity on May 26, 1995

- The redemption of the GRAT's 47.288 MPI shares for a promissory note on May 26, 1996
- The contribution of the remainder of the promissory note received from Pierce for the 35,466 MPI share sale to Marshall gas & Oil, LLC (MGO) in exchange for a 99 percent interest in MGO on May 26, 1995
- The change to the beneficiaries of the Living Trust to add a specific bequest of the 99 percent interest in MGO to a newly formed private foundation, the Marshall Museum and Library (Museum) on May 26, 1995
- The gift of all rights, title, and interest in the GRAT for a period of six years to a Charitable Lead Unitrust (CLUT) benefiting the Museum on May 29, 1995

64. Mrs. Marshall is pursuing *in personam* claims for tortious interference against Mr. E. Pierce Marshall, individually, in a proceeding before the United States Bankruptcy Court for the Central District of California, Los Angeles Division. As such although Mrs. Marshall believes a finding in that matter against E. Pierce Marshall on her tortious interference claims may ultimately be *res judicata* in this proceeding, Mrs. Marshall is not currently asserting here that claim or other *in personam* claims currently asserted against E. Pierce Marshall, individually, in the bankruptcy proceeding. Mrs. Marshall continues to assert her above-claims for tortious interference and civil conspiracy, however, against all other above-referenced defendants, and against E. Pierce Marshall in all other capacities.

65. As a result of these above actions, Mrs. Marshall has suffered actual damages in excess of the minimum jurisdictional requirements of this Court.

* * *

NO. 276,815-402

IN THE ESTATE OF J. HOWARD MARSHALL, II, DECEASED	§	**IN THE PROBATE COURT**
J. HOWARD MARSHALL, III	§	**NUMBER TWO OF**
v.	§	**HARRIS COUNTY, TEXAS**
E. PIERCE MARSHALL, et al	§	

PLAINTIFF VICKIE MARSHALL'S PRELIMINARY JURY QUESTIONS AND INSTRUCTIONS

(Sept. 2000)

Plaintiff Vickie Marshall hereby submits her Preliminary Jury Questions and Instructions.

The Plaintiff submits these preliminary draft questions and instructions at the Court's request. Plaintiff respectfully reserves her right to make additional, different, or alternative submissions of questions and instructions, and objections to questions and instructions submitted to the jury in the Court's Charge, at the appropriate time during the formal charge conference in this matter as the evidence and proceedings at trial may warrant.

Respectfully submitted,

CUNNINGHAM, DARLOW, ZOOK & CHAPOTON, LLP

By: _____

Tom Alan Cunningham
State Bar No. 05244700
Richard J. Zook
State Bar No. 22285400
1700 Chase Tower

600 Travis
Houston, Texas 77002
Telephone: (713) 255-5500
Telecopier: (713) 255-5555

* * *

JURY CHARGES AND INSTRUCTIONS

QUESTION NO. ___ [TORTIOUS INTERFERENCE]

Did any of the Defendants listed below tortiously interfere with the gifts, if any, Mr. Marshall intended for Mrs. Vickie Marshall?

Tortious interference occurred if:

a. there was a reasonable probability that Mrs. Vickie Marshall would have received the gifts; and

b. one or more of the Defendants intentionally prevents Mrs. Vickie Marshall from receiving the gifts with the purpose of causing damage to her.

"Gifts" include, in the broadest sense, any donations, gratuities or benefactions that Mrs. Vickie Marshall would have received from Mr. Marshall. Complete certainty that the gifts would have been made is not required.

Tortious interference occurs when Mr. Marshall was induced to not make the gifts that he intended for Mrs. Vickie Marshall by fraud, duress, deception, defamation, breach of fiduciary duty, or by the forgery, alteration or suppression of a document that would have made the gift.

The wrongful conduct that prevents a gift can include false statements of fact; the insertion in a document

or documents executed by Mr. Marshall of provisions or pages which he did not know were inserted; the omission of intended provisions or pages in a document or documents that Mr. Marshall did not know were omitted; misreading documents to Mr. Marshall; preventing Mr. Marshall from making the gift; wrongfully inducing Mr. Marshall to sign a document which he did not intend to sign by the surreptitious substitution of a different document; or other fraudulent or unlawful means.

Please answer "Yes" or "No" as to each of the following persons:

	ANSWER:
E. Pierce Marshall	_____
Finley Hilliard	_____
Kenneth Farrar	_____

QUESTION NO. ___

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Mrs. Vickie Marshall for her damages, if any, that were proximately caused by such interference?

The damages recoverable for tortious interference with gifts are the value of such gifts, and includes all income, property and appreciation that may arise from such gifts.

Do not add any amount for interest on damages, if any.

Answer in dollars and cents, if any:

ANSWER: $_____

* * *

REPORTER'S RECORD
VOLUME 1 OF 2 VOLUMES

CAUSE NO. 276,815

THE ESTATE OF J. HOWARD MARSHALL, II DECEASED	IN THE PROBATE COURT NUMBER TWO OF HARRIS COUNTY, TEXAS

CAUSE NO. 276,815-402

J. HOWARD MARSHALL, III, ET AL VS. ROBERT MACINTYRE, ET AL	IN THE PROBATE COURT NUMBER TWO OF HARRIS COUNTY, TEXAS

OPENING STATEMENTS

OCTOBER 2, 2000

On the 2nd day of October, 2000, the following proceedings came on to be heard in the above-entitled and numbered cause, before the Honorable Mike Wood, Judge presiding, held in Houston, Harris County, Texas:

Proceedings reported by computerized stenotype machine, Reporter's Record produced by Computer-Assisted Transcription.

* * *

[105] MR. CUNNINGHAM: Thank you, Your Honor. May it please the Court, Ladies and Gentlemen of the jury.

My name is Tom Cunningham, and I represent [106] Mrs. J. Howard Marshall.

* * *

[133] this is a case about tortious interference with an intent to give an inter vivos gift during life. . . .

* * *

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re VICKIE LYNN MARSHALL, Debtor.	Case No. LA 96-12510-SB Adv. No.: LA 96-01838-SB Chapter 11
E. Pierce Marshall, Plaintiff, vs. Vickie Lynn Marshall, Defendant.	**SUPPLEMENTAL MEMORANDUM OF DECISION FOLLOWING TRIAL** (Filed Nov. 21, 2000)
Vickie Lynn Marshall, Counterclaimant, vs. E. Pierce Marshall, Counterdefendant.	DATE: December 6, 2000 TIME: 11:00 a.m. CTRM: 1575

The court on its own motion hereby supplements its amended decision of October 6, 2000 to clarify the court's ruling that this is a core proceeding, to issue its ruling on punitive damages, and to set a further hearing on the proposed findings of fact, conclusions of law and form of judgment to be entered in this adversary proceeding.

1. Core Proceeding

This proceeding began as a proof of claim for defamation that E. Pierce Marshall filed in this chapter 11 case

pursuant to Bankruptcy Code § 501. In response to Pierce Marshall's proof of claim, the debtor objected to the claim and filed a counterclaim for tortious interference with her expectancy of a gift from her deceased husband J. Howard Marshall II, who was Pierce Marshall's father. The counterclaim turned the claim objection into an adversary proceeding pursuant to Rule 3007 of the Federal Rules of Bankruptcy Procedure.

On summary judgment, the debtor prevailed on Pierce Marshall's claim. The debtor also prevailed on the counterclaim after trial on the merits in November, 1999. *See Marshall v. Marshall (In re Marshall)*, 253 B.R. 550 (Bankr. C.D. Cal. 2000).

The court has previously determined that this adversary proceeding is a core proceeding, as defined in 28 U.S.C. § 157. Section 157(b)(2) provides in relevant part:

> Core proceedings include . . .
>
> . . .
>
> (B) allowance or disallowance of claims against the estate . . . ;
>
> (C) counterclaims by the estate against persons filing claims against the estate. . . .

28 U.S.C. § 157 (West 2000). Both the objection to claim and the counterclaim are thus core proceedings under this statutory definition. *See Sun West Distribs., Inc. v. Grumman Energy Sys. Co. (In re Sun West Distribs., Inc.)*, 69 B.R. 861, 864 (Bankr. S.D. Cal. 1987).

2. Punitive Damages

The court has previously determined that this is a proper case for the award of punitive damages. After further examination of the record in this case, the court concludes that the time is now ripe to award the punitive damages.

The major purpose of awarding punitive damages is to punish and deter the wrongful conduct of a party. Under Texas law, the courts generally consider five factors in determining a reasonable punitive damages award: (1) the nature of the wrong; (2) the character of the conduct involved; (3) the degree of culpability of the wrongdoer; (4) the situation and sensibilities of the parties concerned; and (5) the extent to which the defendant's conduct offends the public sense of justice and propriety. *See, e.g., Alamo Nat'l Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981); *North Am. Refractory Co. v. Easter*, 988 S.W.2d 904, 920 (Tex. App. 1999); *Cantu v. Burton*, 921 S.W.2d 344, 351 (Tex. App. 1996). The amount of punitive damages to award the debtor requires the court to evaluate the actions of Pierce Marshall in light of these five factors.

In its prior ruling the court has made findings on two of these factors: the nature of the wrong and the character of the conduct involved. Three factors remain to be examined: the degree of Pierce Marshall's culpability, the extent to which his conduct offends the public sense of justice and propriety, and the situation and sensibilities of the parties. In addition, certain of the court's findings in *Marshall, supra*, are pertinent to all of these factors, and are incorporated herein by reference.

a. Degree of Culpability

In determining the degree of culpability under Texas law, the court considers the defendant's state of mind, the degree of his or her conscious indifference, and his malice. *See Ellis County State Bank v. Keever*, 936 S.W.2d 683, 687 (Tex. 1996). Texas law defines malice as ill will, evil motive, gross indifference or reckless disregard of the rights of others, which may be established by direct or circumstantial evidence. *See J.C. Penny Company, Inc. v. Ruth*, 982 S.W.2d 586, 590 (Tex. 1998).

The court finds that Pierce Marshall's actions as previously determined were undertaken with intentional disregard for the rights of the debtor and the procedures of this court. The court finds that Pierce Marshall's behavior towards the debtor is intentional and reprehensible, and that it constitutes malice toward her.

b. Situation and Sensibilities of the Parties

The situation and sensibilities of the parties refers to evidence of remorse, remedial measures, and ability to pay punitive damages. *See Keever*, 936 S.W.2d at 688.

Pierce Marshall has shown no remorse whatsoever with regard to his tortious actions to keep the debtor from receiving the share of her husband's fortune that he directed his lawyers to arrange for her. Moreover, Pierce Marshall has continued to disobey the court's orders to produce documents for discovery and has raised objections that the court has repeatedly found to be frivolous.

The wealth of the defendant is relevant in determining the amount of punitive damages because such information assists the court in determining an amount sufficient to effectively punish the defendant *See White v. Sullins*, 917 S.W.2d 158, 163 (Tex. 1996). Pierce Marshall has obtained for himself and his immediate family the entire 16% interest in Koch Industries that his father held. This court has found that these assets were worth more than $1.6 billion as of August 31, 1999. The court finds that Pierce Marshall easily has the ability to pay the punitive damages assessed herein.

d. Offending Public Sense of Justice and Propriety

Finally, the Court believes that Pierce Marshall's actions described in this court's prior ruling offend the public sense of justice and propriety. In particular, his totally unjustified refusal to provide discovery in this adversary proceeding has prevented this court from determining this adversary proceeding on its merits. Because this is a high profile case that has attracted substantial public attention, Pierce Marshall's conduct substantially promotes a disrespect for the federal courts and the degree of justice that they dispense.

At the same time, the court must keep its mind that an award of punitive damages is subject to due process considerations prohibiting grossly excessive punishment. *See BMW v. Gore*, 517 U.S. 559 (1996).

In light of all these factors, the court assesses punitive damages against Pierce Marshall in the amount of $25 million. In the court's judgment, this amount sufficiently serves the purpose of punishing and deterring Pierce

Marshall's behavior. At the same time, the amount of the damages satisfies constitutional considerations regarding excessiveness.

3. Findings of Fact and Conclusions of Law

The debtor requests that the court enter certain specified additional findings of fact and conclusions of law not incorporated into its amended *Marshall* decision. *See* Emergency Ex Parte Application for Entry of Final Judgment and for Entry of Supplemental Findings, at 9. Requests 2 and 3 are denied. Pierce Marshall is hereby given an opportunity to respond to Requests 1 and 4 by November 30, 2000. A hearing on these requests is set for December 6, 2000 at 11:00 a.m.

4. Nature and Form of Judgment

Because the court has now made its award of punitive damages, judgment is now ready for entry in this adversary proceeding. Such a judgment should include the award of $449,754,934 in compensatory damages and $25 million in punitive damages.

The debtor also requests an injunction against Pierce Marshall, to require him (1) to deposit 428,333 shares of common stock in Koch Industries, Inc. and 1934 shares of preferred stock with the court; (2) to prohibit Pierce Marshall and his agents from transferring or encumbering these shares of Koch stock; and (3) to require that all dividends on these shares of stock be deposited into a trust account for the debtor. These provisions would remain in force until this court's money judgment is satisfied.

The court questions whether these provisions are appropriate as a part of the court's judgment. The court particularly would like to see authority that such an order is appropriate in place of enforcement procedures to be undertaken by the debtor.

The court directs the parties to brief this issue for the December 6 hearing. Any briefs by the debtor in support of these provisions shall be served by same day delivery and filed by November 28, 2000. Any opposition shall be served by same day delivery and filed (with a copy delivered to chambers) by December 1, 2000.

Dated: November 21, 2000

/s/ Samuel L. Bufford
Samuel L. Bufford
United States Bankruptcy
Judge

[Certificate Of Mailing Omitted In Printing]

PHILIP W. BOESCH, JR. (State Bar No. 60608)
1901 Avenue of the Stars, Seventh Floor
Los Angeles, California 90067
Telephone: (310) 201-2002/Facsimile: (310) 284-6018

REX S. HEINKE, ESQ. (State Bar No. 66163)
SHEILA S. KATO, ESQ. (State Bar No. 57447)
GREINES, MARTIN, STEIN & RICHARD LLP
9601 Wilshire Boulevard, Suite 544
Beverly Hills, California 90210-5207
Telephone: (310) 859-7811/Facsimile: (310) 276-5261

Attorneys for Debtor and Counterclaimant
VICKIE LYNN MARSHALL

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re VICKIE LYNN MARSHALL, Debtor.	BANKR. CASE NO. LA 96-12510SB Adversary No. 96-01838 Bankr Judge: Hon. Samuel L. Bufford
E. Pierce Marshall, Plaintiff, vs. Vickie Lynn Marshall, Defendant.	**FINAL JUDGMENT** (Filed Dec. 29, 2000) TRIAL DATE: October 25, 1999 DATE: December 6, 2000 TIME: 11:00 PLACE: Courtroom 1575 Roybal Federal Building 255 E. Temple Street Los Angeles, CA 90012
Vickie Lynn Marshall, Counterclaimant, vs. E. Pierce Marshall, Counterdefendant.	

TO THE HONORABLE SAMUEL L. BUFFORD, UNITED STATES BANKRUPTCY JUDGE, AND OTHER INTERESTED PARTIES:

This action came on for trial before the Court, and the issues having been duly tried and a decision having been duly rendered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Vickie Lynn Marshall, and against E. Pierce Marshall, as follows:

1. That Vickie Lynn Marshall recovers from E. Pierce Marshall compensatory damages in the amount of $449,754,134.

2. That the above amount shall bear interest from and including October 6, 2000 at the rate set forth in 28 U.S.C. § 1961.

3. That Vickie Lynn Marshall recovers from E. Pierce Marshall punitive damages in the amount of $25,000,000.

4. That the above amount shall bear interest from and including November 21, 2000 at the rate set forth in 28 U.S.C. § 1961.

5. That E. Pierce Marshall recovers nothing against Vickie Lynn Marshall.

6. That Vickie Lynn Marshall recovers from E. Pierce Marshall her costs of suit in this entire action in the amount of ___.

7. That the amounts, if any, which are hereinafter collected for release or satisfaction of claims made in the

Texas probate action shall be deemed to be payments made toward satisfaction of this judgment.

~~8. That E. Pierce Marshall, his agents, employees, representatives and all persons acting in concert or participating with him, are directed to endorse and deposit with the Clerk of this Court, or anyone the Court appoints for this purpose, 4,283,325 shares of Koch Industries, Inc. ("Koch") common stock and 1934 shares of Koch preferred stock, which constitute 50% of the Koch shares held by E. Pierce Marshall individually or through Marshall Petroleum, Inc. ("MPI"), Trof, Inc., or its successors or assigns or the proportionate number of Koch shares in the event that Koch issues additional shares (e.g. stock split) – which will be held until such time as the money judgment set forth above has been satisfied. Notwithstanding the above, all or part of such stock may be released in response to a writ of execution on the money judgment set forth above.~~ [/s/ SLB]

~~9. That E. Pierce Marshall, his agents, employees, representatives and all persons acting in concert or participating with him, are enjoined and restrained (except or as provided in paragraph 7 above or in connection with a writ of execution on this money judgment) from directly or indirectly transferring, encumbering, or otherwise restricting or alienating, by any means whatsoever, E. Pierce Marshall's interest in Koch, whether held by E. Pierce Marshall individually or through MPI, Trof, Inc., or its successors or assigns, until such time as the money judgment set forth above has been satisfied.~~ [/s/ SLB]

~~10. That E. Pierce Marshall, his agents, employees, representatives and all persons acting in concert or participating with him, shall pay to Debtor any and all~~

~~proceeds or dividends from said Koch stock whether held by E. Pierce Marshall individually or through MPI, Trof, Inc. or its successors or assigns, into an interest-bearing trust account for the sole benefit of Vickie Lynn Marshall from the date of this judgment until such time as the money judgment set forth above has been satisfied, withdrawals from which may only be made for the purpose of satisfying the money judgment set forth above or in connection with a writ of execution on this Judgment.~~ [/s/ SLB]

~~11. The Court shall retain jurisdiction of this case for such other and further orders as may be necessary.~~ [/s/ SLB]

DATED: 12/29/2000

/s/ Samuel L. Bufford
HONORABLE
SAMUEL L. BUFFORD
UNITED STATES
BANKRUPTCY JUDGE

NO. 276,815-402

IN THE ESTATE OF J. HOWARD MARSHALL, II DECEASED	§	**IN THE PROBATE COURT**
J. HOWARD MARSHALL, III, *et al.*	§	
Plaintiffs	§	**NUMBER TWO OF**
v.	§	
ROBERT S. MACINTYRE, *et al*	§	**HARRIS COUNTY, TEXAS**
Defendants	§	

Charge of the Court

(Filed March 7, 2001)

LADIES AND GENTLEMEN OF THE JURY:

This case is submitted to you by asking questions about the facts, which you must decide from the evidence you have heard in this trial. You are the sole judges of the credibility of the witnesses and the weight to be given their testimony, but in matters of law, you must be governed by the instructions in this Charge. In discharging your responsibility on this Jury, you will observe all the instructions which have previously been given you. I shall now give you additional instructions which you should carefully and strictly follow during your deliberations.

1. Do not let bias, prejudice or sympathy play any part in your deliberations.

2. In arriving at your answers, consider only the evidence introduced here under oath and such exhibits, if any, as have been introduced for your consideration under the rulings of the Court, that is, what you have

seen and heard in this courtroom, together with the law as given you by the Court. In your deliberations, you will not consider or discuss anything that is not represented by the evidence in this case.

3. Since every answer that is required by the Charge is important, no juror should state or consider that any required answer is not important.

4. You must not decide who you think should win, and then try to answer the questions accordingly. Simply answer the questions, and do not discuss nor concern yourselves with the effect of your answers.

5. You will not decide the answer to a question by lot or by drawing straws, or by any other method of chance. Do not return a quotient verdict. A quotient verdict means that the jurors agree to abide by the result to be reached by adding together each juror's figures and dividing by the number of jurors to get an average. Do not do any trading on your answers; that is, one juror should not agree to answer a certain question one way if others agree to answer another question another way.

6. You may render your verdict upon the vote of ten or more members of the Jury The same ten or more of you must agree upon all of the answers made and to the entire verdict. You will not, therefore, enter into an agreement to be bound by a majority or any other vote of less than ten jurors. If the verdict and all of the answers therein are reached by unanimous agreement, the presiding juror shall sign the verdict for the entire Jury. If any juror disagrees as to any answer made by the verdict, those jurors who agree to all findings shall each sign the verdict.

7. You have been allowed to take notes during the trial of this case. You may have those notes with you in the jury room during your deliberations. The notes you have

taken are not evidence. Your personal recollection of the evidence takes precedence over any notes you have taken. You should base your verdict only on the evidence presented during the trial. You may not display your notes or disclose the contents of your notes to any other juror during your deliberations. To do so is a violation of these instructions.

These instructions are given you because your conduct is subject to review the same as that of the witnesses, parties, attorneys and the Judge. If it should be found that you have disregarded any of these instructions, it will by jury misconduct and it may require another trial by another jury; then all of our time will have been wasted. The presiding juror or any other who observes a violation of the Court's instructions shall immediately warn the one who is violating the same and caution the juror not to do so again. When words are used in this charge in a sense which varies from the meaning commonly understood, you are given a proper legal definition, which you are bound to accept in place of any other meaning.

Answer "Yes" or "No" to all questions unless otherwise instructed. A "Yes" answer must be based on a preponderance of the evidence. If you do not find that a preponderance of the evidence supports a "Yes" answer, then answer "No." The term "preponderance of the evidence" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case. Whenever a question requires other than a "Yes" or "No" answer, your answer must be based on a preponderance of the evidence.

In answering a question based on a preponderance of the evidence, a fact may be established by direct evidence or by circumstantial evidence or both. A fact is established

by direct evidence when proved by documentary evidence or by witnesses who saw the act done or heard the words spoken. A fact is established by circumstantial evidence when it may be fairly and reasonably inferred from other facts proven.

"Clear and convincing evidence" means that the evidence presented must have been so clear, direct, weighty, and convincing as to enable you to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. This is a greater degree of persuasion than is necessary to meet the preponderance of the evidence standard.

In answering a question based on "clear and convincing evidence", a "Yes" answer must be based on clear and convincing evidence, and if you do not find that clear and convincing evidence supports a "Yes" answer, then answer "No".

If you answer questions about damages, answer each question separately. Do not increase or reduce the amount in one answer because of the instructions in or your answers to any other questions about damages. Do not speculate about what any party's ultimate recovery may or may not be. Any recovery will be determined by the court when it applies the law to your answers at time of judgment.

DEFINITIONS

1. "Testamentary capacity," with respect to a will or codicil means sufficient mental ability at the time of the execution of the will or codicil for **J. Howard Marshall, II**:

a. to understand the affect of his act in making the will or codicil;

b. to understand the general nature and extent of his property;

c. to know his next of kin and the natural objects of bounty, and their claims on him; and

d. to have sufficient memory to collect in his mind the elements of the business to be transacted, to hold these elements long enough to perceive at least their obvious relation to each other, and to be able to form a reasonable judgment as to them.

2. "Natural objects of his bounty" means **J. Howard Marshall, II's** descendants unless the evidence indicates otherwise.

3. "Mental capacity", for the purpose of executing an instrument other than a will or codicil, exists when **J. Howard Marshall, II**, in executing the instrument, had sufficient mind and memory to understand the nature and effect of the act in which he was engaged and the business which he was transacting.

4. "Undue influence" means that there was such dominion and control exercised over the mind of **J. Howard Marshall II** when he executed the will, codicil or trust, under the facts and circumstances then existing, as to overcome his free will. In effect, the will of the party exerting undue influence was substituted for that of **J. Howard Marshall II** preventing him from exercising his own discretion and causing him to do what he would not have done but for such dominion or control.

NO. 276,815-402

IN THE ESTATE OF J. HOWARD MARSHALL, II DECEASED	§	**IN THE PROBATE COURT**
J. HOWARD MARSHALL, III, *et al.*	§	
Plaintiffs	§	**NUMBER TWO OF**
v.	§	
ROBERT S. MACINTYRE, *et al*	§	**HARRIS COUNTY, TEXAS**
Defendants	§	

Additional Definition

"Bettye B. Marshall Trusts" shall mean the Bettye B. Marshall Living Trust, J. Howard Marshall, II, Marital Trust Number Two, and the E. Pierce Marshall Family Trust created under the Bettye B. Marshall Trust Indenture dated October 30, 1980.

QUESTION NO. 1

Do you find that **J. Howard Marshall, II** had testamentary capacity when he executed the purported codicil dated June 11, 1993, Marshall Family Defendant Exhibit (MFDX) 567?

Answer "Yes" or "No"

Answer: Y

Go to Question No. 2.

QUESTION NO. 2

Do you find that **J. Howard Marshall, II** executed the purported codicil dated June 11, 1993, MFDX 567, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: N

Go to Question No. 3.

QUESTION NO. 3

Do you find that **J. Howard Marshall, II** had testamentary capacity when he executed the purported will dated December 22, 1992, MFDX 560?

Answer "Yes" or "No".

Answer: Y

Go to Question No. 4.

QUESTION NO. 4

Do you find that **J. Howard Marshall, II** executed the purported will dated December 22, 1992, MFDX 560, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: N

If you have answered "Yes" to Question No. 3 and "No" to Question No. 4, go to Question No. 19. Otherwise, go to Question No. 5.

If you have answered "No" to Question No. 3 or "Yes" to Question No. 4, then answer the following Question No. 5. Otherwise, do not answer Question No. 5.

QUESTION NO. 5

Do you find that **J. Howard Marshall, II** had testamentary capacity when he executed the purported will dated June 23, 1992, MFDX 559?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 6.

If you have answered "No" to Question No. 3 or "Yes" to Question No. 4, then answer the following Question No. 6. Otherwise, do not answer Question No. 6.

QUESTION NO. 6

Do you find that **J. Howard Marshall, II** executed the purported will dated June 23, 1992, MFDX 559, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "Yes" to Question No. 5 and "No" to Question No. 6, go to Question No. 19. Otherwise, go to Question No. 7.

If you have answered "No" to Question No. 5 or "Yes" to Question No. 6, then answer the following Question No. 7. Otherwise, do not answer Question No. 7.

QUESTION NO. 7

Do you find that **J. Howard Marshall, II** had testamentary capacity when he executed the purported will dated October 19, 1990, MFDX 561?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 8

If you have answered "No" to Question No. 5 or "Yes" to Question No. 6. then answer the following Question No. 5. Otherwise. do not answer Question No. 8.

QUESTION NO. 8

Do you find that **J. Howard Marshall, II** executed the purported will dated October 19, 1990, MFDX 561, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "Yes" to Question No. 7 and "No" to Question No. 8, go to Question No. 19. Otherwise, go to Question No. 9.

If you have answered "No" to Question No. 7 or "Yes" to Question No. 8, then answer the following Question No. 9. Otherwise, do not answer Question No. 9.

QUESTION NO. 9

Do you find that **J. Howard Marshall, II** had testamentary capacity when he executed the purported will dated April 21, 1989, MFDX 562?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 10.

If you have answered "No" to Question No. 7 or "Yes" to Question No. 8, then answer the following Question No. 10. Otherwise, do not answer Question No. 10.

QUESTION NO. 10

Do you find that **J. Howard Marshall, II** executed the purported will dated April 21, 1989, MFDX 562, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "Yes" to Question No. 9 and "No" to Question No. 10, go to Question No. 19. Otherwise, go to Question No. 11.

If you have answered "No" to Question No. 9 or "Yes" to Question No. 10, then answer the following Question No. 11. Otherwise, do not answer Question No. 11.

QUESTION NO. 11

Do you find that **J. Howard Marshall, II** had testamentary capacity when he executed the purported will dated August 16, 1984, MFDX 563?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 12.

If you have answered "No" to Question No. 9 or "Yes" to Question No. 10, then answer the following Question No. 12. Otherwise, do not answer Question No. 12.

QUESTION NO. 12

Do you find that **J. Howard Marshall, II** executed the purported will dated August 16, 1984, MFDX 563, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "Yes" to Question No. 11 and "No" to Question No. 12, go to Question No. 19. Otherwise, go to Question No. 13.

If you have answered "No" to Question No. 11 or "Yes" to Question No. 12, then answer the following Question No. 13. Otherwise, do not answer Question No. 13.

QUESTION NO. 13

Do you find that **J. Howard Marshall, II** had testamentary capacity when he executed the purported will dated September 1, 1982, MFDX 565?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 14.

If you have answered "No" to Question No. 11 or "Yes" to Question No. 12, then answer the following Question No. 14. Otherwise, do not answer Question No. 14.

QUESTION NO. 14

Do you find that **J. Howard Marshall, II** executed the purported will dated September 1, 1982, MFDX 565, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "Yes" to Question No. 13 and "No" to Question No. 14, go to Question No. 19. Otherwise, go to Question No. 15.

If you have answered "No" to Question No. 13 or "Yes" to Question No. 14, then answer the following Question No. 15. Otherwise, do not answer Question No. 15.

QUESTION NO. 15

Do you find that **J. Howard Marshall, II** had testamentary capacity when he executed the purported codicil dated September 1, 1982, MFDX 566?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 16.

If you have answered "No" to Question No. 13 or "Yes" to Question No. 14, then answer the following Question No. 16. Otherwise, do not answer Question No. 16.

QUESTION NO. 16

Do you find that **J. Howard Marshall, II** executed the purported codicil dated September 1, 1982, MFDX 566, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 17.

THERE IS NO QUESTION NO. 17

Go to Question 18.

THERE IS NO QUESTION NO. 18

Go to Question No. 19.

If you have answered "Yes" to Question No. 17 or "Yes" to Question No. 18, then answer the following Question No. 19. Otherwise, do not answer Question No. 19.

QUESTION NO. 19

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust dated July 13, 1994 Plaintiff's Exhibit (PX) 227?

Answer "Yes" or "No".

Answer: N

Go to Question 20.

If you have answered "Yes" to Question No. 18 or "Yes" to Question No. 19, then answer the following Question No. 20. Otherwise, do not answer Question No. 20.

QUESTION NO. 20

Do you find that **J. Howard Marshall, II** executed the trust dated July 13, 1994, PX 227, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: N

If you have answered "No" to Question No. 19 and "No" to Question No. 20, go to Question No. 38. Otherwise, go to Question No. 21.

If you have answered "Yes" to Question No. 19 or "Yes" to Question No. 20, then answer the following Question No. 21. Otherwise, do not answer Question No. 21.

QUESTION NO. 21

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust dated December 22, 1992, PX 2081?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 22.

If you have answered "Yes" to Question No. 19 or "Yes" to Question No. 20, then answer the following Question No. 22. Otherwise, do not answer Question No. 22.

QUESTION NO. 22

Do you find that **J. Howard Marshall, II** executed the trust dated December 22, 1992, PX 2081, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "No" to Question No. 21 and "No" to Question No. 22, go to Question No. 30. Otherwise, go to Question No. 23.

If you have answered "Yes" to Question No. 21 or "Yes" to Question No. 22, then answer the following Question No. 23. Otherwise, do not answer Question No. 23.

QUESTION NO. 23

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust dated June 23, 1992, PX 1280?

Answer "Yes" or "No".

Answer: ___ ____

Go to Question No. 24.

If you have answered "Yes" to Question No. 21 or "Yes" to Question No. 22, then answer the following Question No. 24. Otherwise, do not answer Question No. 24.

QUESTION NO. 24

Do you find that **J. Howard Marshall, II** executed the trust dated June 23, 1992, PX 1280, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "No" to Question No. 23 and "No" to Question No. 24, go to Question No. 38. Otherwise, go to Question No. 25.

If you have answered "Yes" to Question No. 23 or "Yes" to Question No. 24, then answer the following Question No. 25. Otherwise, do not answer Question No. 25.

QUESTION NO. 25

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust dated October 19, 1990, PX 1274?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 26.

If you have answered "Yes" to Question No. 23 or "Yes" to Question No. 24, then answer the following Question No. 26. Otherwise, do not answer Question No. 26.

QUESTION NO. 26

Do you find that **J. Howard Marshall, II** executed the trust dated October 19, 1990, PX 1274, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "No" to Question No. 25 and "No" to Question No. 26, go to Question No. 38. Otherwise, go to Question No. 27.

If you have answered "Yes" to Question No. 25 or "Yes" to Question No. 26, then answer the following Question No. 27. Otherwise, do not answer Question No. 27.

QUESTION NO. 27

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust amendment dated December 20, 1989, MFDX 195?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 28.

If you have answered "Yes" to Question No. 25 or "Yes" to Question No. 26, then answer the following Question No. 28. Otherwise, do not answer Question No. 28.

QUESTION NO. 28

Do you find that **J. Howard Marshall, II** executed the trust amendment dated December 20, 1989, MFDX 195, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "No" to Question No. 27 and "No" to Question No. 28, go to Question No. 38. Otherwise, go to Question No. 29.

If you have answered "Yes" to Question No. 27 or "Yes" to Question No. 28, then answer the following Question No. 29. Otherwise, do not answer Question No. 29.

QUESTION NO. 29

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust dated April 21, 1989, PX 1266?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 30.

If you have answered "Yes" to Question No. 27 or "Yes" to Question No. 28, then answer the following Question No. 30. Otherwise, do not answer Question No. 30.

QUESTION NO. 30

Do you find that **J. Howard Marshall, II** executed the trust dated April 21, 1989, PX 1266, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "No" to Question No. 29 and "No" to Question No. 30, go to Question No. 38. Otherwise, go to Question No. 31.

If you have answered "Yes" to Question No. 29 or "Yes" to Question No. 30, then answer the following Question No. 31. Otherwise, do not answer Question No. 31.

QUESTION NO. 31

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust amendment dated March 1, 1985, MFDX 166?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 32.

If you have answered "Yes" to Question No. 29 or "Yes" to Question No. 30, then answer the following Question No. 32. Otherwise, do not answer Question No. 32.

QUESTION NO. 32

Do you find that **J. Howard Marshall, II** executed the trust amendment dated March 1, 1985, MFDX 166, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "No" to Question No. 31 and "No" to Question No. 32, go to Question No. 38. Otherwise, go to Question No. 33.

If you have answered "Yes" to Question No. 31 or "Yes" to Question No. 32, then answer the following Question No. 33. Otherwise, do not answer Question No. 33.

QUESTION NO. 33

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust dated August 16, 1984, PX 1255?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 34.

If you have answered "Yes" to Question No. 31 or "Yes" to Question No. 32, then answer the following Question No. 34. Otherwise, do not answer Question No. 34.

QUESTION NO. 34

Do you find that **J. Howard Marshall, II** executed the trust dated August 16, 1984, PX 1255, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

If you have answered "No" to Question No. 33 and "No" to Question No. 34, go to Question No. 38. Otherwise, go to Question No. 35.

If you have answered "Yes" to Question No. 33 or "Yes" to Question No. 34, then answer the following Question No. 35. Otherwise, do not answer Question No. 35.

QUESTION NO. 35

Do you find that **J. Howard Marshall, II** lacked mental capacity when he executed the trust dated September 1, 1982, PX 2171?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 36.

If you have answered "Yes" to Question No. 33 or "Yes" to Question No. 34, then answer the following Question No. 36. Otherwise, do not answer Question No. 36.

QUESTION NO. 36

Do you find that **J. Howard Marshall, II** executed the trust dated September 1, 1982, PX 2171, as a result of undue influence exerted by **E. Pierce Marshall**?

Answer "Yes" or "No".

Answer: _____

Go to Question No. 38.

THERE IS NO QUESTION NO. 37.

QUESTION NO. 38

On December 1 and 2, 1980, did **J. Howard Marshall, II** and **J. Howard Marshall, III** enter into an agreement providing that **J. Howard Marshall, II** would treat **J. Howard Marshall, III** and **E. Pierce Marshall** equally in **J. Howard Marshall, II's** estate planning and property?

In deciding whether the parties reached an agreement, you may consider what they said and did in light of the surrounding circumstances, including any earlier course of dealings. You may not consider the parties' unexpressed thoughts or intentions.

Answer "Yes" or "No".

Answer: N

If you answered Question No. 38 "Yes", go to Question No. 39. Otherwise, go to Question No. 42.

If you have answered "Yes" to Question No. 38, then answer the following Question No. 39. Otherwise, do not answer Question No. 39.

QUESTION NO. 39

Did the agreement between **J. Howard Marshall, II** and **J. Howard Marshall, III**, you have found in answer to Question No. 38 include an agreement that **J. Howard Marshall, III** and his family would receive a gift or inheritance equal to the value of any gift (other than annual exclusion gifts) or inheritance received by **E. Pierce Marshall** and his family from **J. Howard Marshall, II**?

It is your duty to interpret the language of the agreement. You must decide the meaning of the agreement by determining the intent of the parties at the time of the agreement. Consider all of the facts and circumstances surrounding the making of the agreement, the interpretation placed on the agreement by the parties, and the conduct of the parties.

Answer "Yes" or "No".

Answer: _____

If you answered "Yes" to Question No. 39, go to Question No. 40. Otherwise, go to Question No. 42.

If you have answered "Yes" to Question No. 39, then answer the following Question No. 40. Otherwise, do not answer Question No. 40.

QUESTION NO. 40

Did **J. Howard Marshall, II** fail to comply with the agreement you found to exist in Question No. 39?

Answer "Yes" or "No".

Answer: _____

If you answered "Yes" to Question No. 40, go to Question No. 41. Otherwise, go to Question No. 42.

If you have answered "Yes" to Question No. 40, then answer the following Question No. 41. Otherwise, do not answer Question No. 41.

QUESTION NO. 41

What sum of money, if any, if paid now in cash would fairly and reasonably compensate **J. Howard Marshall, III** for his damages, resulting from **J. Howard Marshall, II's** failure to comply, if any, with the agreement?

Consider the following element, if any, and none other:

The value of gifts, if any, made to **E. Pierce Marshall** and his family by **J. Howard Marshall, II**, not including annual exclusion gifts, after December 2, 1980. The value must be determined as of the date of the gift

A "gift" is a voluntary transfer of property to another made gratuitously and without consideration.

Do not add any amount for interest on damages, if any.

Answer in dollars and cents, if any.

Answer: $_____

Go to Question No. 42.

If you have answered "No" to Question No. 39, then answer the following Question No. 42. Otherwise, do not answer Question No. 42.

QUESTION NO. 42

Did **J. Howard Marshall, II** commit fraud upon **J. Howard Marshall, III**?

Fraud occurs when –

a. a party makes a material misrepresentation;

b. the misrepresentation is made with knowledge of the falsity or made recklessly without any knowledge of the truth and as a positive assertion,

c. the misrepresentation is made with the intention that is should be acted upon by the other party, and

d. the other party acts in reliance on the misrepresentation and thereby suffers injury.

"Misrepresentation" means a promise of future performance made with an intent not to perform as promised.

Answer "Yes" or "No"

Answer: N

If you answered "Yes" to Question No. 42, go to Question No. 43. Otherwise, go to Question No. 45.

If you have answered Question No. 42 "Yes", then answer the following Question No. 43. Otherwise, do not answer Question No. 43.

QUESTION NO. 43

What sum of money, if any, if paid now in cash would fairly and reasonably compensate **J. Howard Marshall, III** for his damages, if any, proximately caused by the fraud committed by **J. Howard Marshall, II**?

The measure of damages for fraud is the difference between the actual value of that which **J. Howard Marshall, III** received and the value of that which he would have received but for the fraud.

Do not include any amount for interest, if any.

Answer in dollars and cents, if any.

Answer: $_____

Go to Question No. 44.

If you have answered "Yes" to Question No. 40, then answer the following Question No. 44. Otherwise, do not answer Question No. 44.

QUESTION NO. 44

Did **E. Pierce Marshall** intentionally interfere with the agreement between **J. Howard Marshall, II** and **J. Howard Marshall, III**?

Interference is intentional if committed with the desire to interfere with the contract or with the belief that interference is substantially certain to result.

A party charged with interference must know about the actual agreement.

Answer "Yes" or "No".

Answer: _____

Go to Question No. 45.

QUESTION NO. 45

Did **E. Pierce Marshall** tortiously interfere with **J. Howard Marshall, III's** right, if any, to inherit from **J. Howard Marshall, II**?

Tortious interference with inheritance occurs when:

a. a party has an expectancy of inheritance or gift;

b. there is a reasonable certainty that the expectancy would have been realized, but for the interference;

c. the interference with the expectancy is intentional and without just or excuse;

d. the interference takes the form of conduct such as fraud, duress or undue influence; and

e. damages result from the interference.

Answer "Yes" or "No":

Answer: N

If you have answered "Yes" to Question No. 45 or Question No. 45, go to Question No. 46. Otherwise, go to Question No. 49.

If you have answered "Yes" to Question No. 44 or "Yes" to Question No. 45, then answer the following Question No. 46. Otherwise, do not answer Question No. 46.

QUESTION NO. 46

What sum of money, if paid now in cash, would fairly and reasonably compensate **J. Howard Marshall, III** for his damages, if any, proximately caused by the intentional interference found by you in answer to Questions No. 44 or No 45.

You may consider the following element of damages and no others:

Actual pecuniary losses caused by the interference;

Answer in dollars and cents, if any.

Answer: $_____

Go to Question No. 47.

If you have answered Question No. 44 or Question No. 45 "Yes", then answer the following Question No. 47. Otherwise, do not answer Question No. 47.

QUESTION NO. 47

Do you find by clear and convincing evidence that the tortious interference found by you, if any, in Question No. 44 or Question No. 45, was committed by **E. Pierce Marshall** with malice?

"Malice" means:

(a) a specific intent by **E. Pierce Marshall** to cause substantial injury to **J. Howard Marshall III**; or

(b) an act or omission by **E. Pierce Marshall**,

(i) which, when viewed objectively from the standpoint of **E. Pierce Marshall** at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which **E. Pierce Marshall** had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

Answer "Yes" or "No":

Answer: _____

If your answer is "Yes" to Question No. 47, go to Question No. 48. Otherwise, go to Question No. 49.

If you have answered "Yes" to Question No. 47, then answer the following Question No. 48 Otherwise, do not answer Question No. 48.

QUESTION NO. 48

What sum of money, if any, if paid now in cash, should be assessed against **E. Pierce Marshall** and awarded to **J. Howard Marshall, III** as exemplary damages for the conduct found in response to Question No. 48?

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are –

a) The nature of the wrong;

b) The character of the conduct involved;

c) The degree of culpability of **E. Pierce Marshall**;

d) The situation and sensibilities of the parties concerned;

e) The extent to which such conduct offends a public sense of justice and propriety.

Answer dollars and cents, if any.

Answer: $_____

Go to Question No. 49.

If you have answered:

"No" to Question No. 13 or "Yes" to Question No. 14; or

"Yes" to Question No. 35 or "Yes" to Question No. 36; or

"Yes" to Question No. 40; or

"Yes" to Question No. 42,

then answer the following Question No. 49. Otherwise, do not answer Question No. 49.

QUESTION NO. 49

Do you find that a relationship of trust and confidence existed between **E. Pierce Marshall** and **J. Howard Marshall, II** prior to and on August 24, 1993?

A relationship of trust and confidence existed if **J. Howard Marshall II** justifiably placed trust and confidence in **E. Pierce Marshall** to act in **J. Howard Marshall II's** best interest. **J. Howard Marshall II's** subjective trust and feelings alone do not justify transforming arm's-length dealings into a relationship of trust and confidence.

Answer "Yes" or "No".

Answer: _____

Go to Question No. 50

If you have answered "Yes" to Question No. 49, then answer the following Question No. 50. Otherwise do not answer Question No. 50.

QUESTION NO. 50

Did **E. Pierce Marshall** comply with his fiduciary duties to **J. Howard Marshall, II** with regard to any of the following transactions:

You are instructed as that because of their relationship of trust and confidence. **E. Pierce Marshall** owed **J. Howard Marshall II** a fiduciary duty. To prove he complied with his duty, **E. Pierce Marshall** must show:

a. The transactions in question were fair and equitable to **J. Howard Marshall, II**.

b. **E. Pierce Marshall** made reasonable use of the confidence that **J. Howard Marshall II** placed in him;

c. **E. Pierce Marshall** acted in the utmost good faith and ~~failed to exercise~~ exercised the most scrupulous honesty toward **J. Howard Marshall II**;

d. **E. Pierce Marshall** placed the interests of **J. Howard Marshall II** before his own, did not use the advantage of his position to gain a benefit for himself at the expense of **J. Howard Marshall II**, and did not place himself in any position where his self interest might conflict with his obligations as a fiduciary; and

e. **E. Pierce Marshall** fully and fairly disclosed all important information to **J. Howard Marshall II** concerning the transactions.

Answer "Yes" or "No" as to each.

a. 8/24/93 Act of Donation (2,146 shs.) (testimony only) a.__

b. 8/24/93 Act of Donation (2,044 shs.) (PX 2387) b.__

c. 8/25/93 Credit Sale of Stock (35,466 shs.) (PX 2361) c.__

d. 8/25/93 GRAT (47,288 shs.) (PX 2785) d.__

e. 8/25/93 Agreement (14,056 shs.) (PX 2117) e.__

Go to Question No. 51.

If you have answered:

"No" to Question No. 13 or "Yes" to Question No. 14; or

"Yes" to Question No. 35 or "Yes" to Question No. 36, or

"Yes" to Question No. 40; or

"Yes" to Question No. 42,

then answer the following Question No. 51. Otherwise, do not answer Question No. 51

QUESTION NO. 51

Did **E. Pierce Marshall** comply with his fiduciary duties to **J. Howard Marshall, II** and/or the **J. Howard Marshall, II Living Trust** with regard to any of the following transactions:

You are instructed as Trustee of the Living Trust and as attorney in fact, **E. Pierce Marshall** owed **J. Howard Marshall II** a fiduciary duty. To prove he complied with his duty, **Pierce Marshall** must show:

a. The transactions in question were fair and equitable to **J. Howard Marshall, II**.

b. **Pierce Marshall** made reasonable use of the confidence that **J. Howard Marshall II** placed in him;

c. **E. Pierce Marshall** acted in the utmost good faith and failed to ~~failed to exercise~~ exercised most scrupulous honesty toward **Howard Marshall II**;

d. **E. Pierce Marshall** placed the interests of **J. Howard Marshall II** before his own, did not use the advantage of his position to gain a benefit for himself at the expense of **J. Howard Marshall II**, and did not place himself in any position where his self-interest might conflict with his obligations as a fiduciary; and

e. **E. Pierce Marshall** fully and fairly disclosed all important information to **J. Howard Marshall II** concerning the transactions.

Answer "Yes" or "No" as to each:

a. 12/28/94 Renunciation (PX 230a) a.___

b. 5/26/95 Sale for Private Annuity (63,051 shs.) (PX 1354) b.___

c. 5/26/95 Sale (47,288 shs.) (PX 2368) c.___

Go to Question No. 52.

If you have answered Question No. 40 "Yes", then answer the following Question No. 52. Otherwise, do not answer Question No. 52.

QUESTION NO. 52

Did **J. Howard Marshall, II** repudiate the agreement you have found in Question No. 39 with **J. Howard Marshall, III**?

A party repudiates an agreement when he indicates, by his words or actions, that he is not going to perform his obligations under the agreement in the future, showing a fixed intention to abandon, renounce and refuse to perform the agreement. For repudiation to be effective, it must be adopted by the non-repudiating party.

Answer "Yes" or "No"

Answer: _____

Go to Question No. 53.

If you have answered "Yes" to Question No. 40 or Question No. 52, then answer the following Question No. 53. Otherwise, do not answer Question No. 53.

QUESTION NO. 53

On what date did **J. Howard Marshall, III**, discover, or should he have discovered in the exercise of ordinary diligence, that **J. Howard Marshall, II** had repudiated or had failed to comply with the agreement?

Answer by stating a date:

Answer: _____

Go to Question No. 54.

If you have answered "Yes" to Question No. 45, then answer the following Question No. 54. Otherwise, do not answer Question No. 54.

QUESTION NO. 54

On what date did **J. Howard Marshall, III** discover or should he have discovered in the exercise of ordinary diligence, that **Pierce Marshall** tortiously interfered with a gift or inheritance to him from **J. Howard Marshall, II**?

Answer by stating the date:

Answer: _____

Go to Question No. 55.

If you have answered "Yes" to Question No. 44, then answer the following Question No. 55. Otherwise, do not answer Question No. 55.

QUESTION NO. 55

On what date did **J. Howard Marshall, III** discover or should he have discovered in the exercise of ordinary diligence, that **Pierce Marshall** tortiously interfered with the agreement between him and **J. Howard Marshall, II**?

Answer by stating the date:

Answer: _____

Go to Question No. 56.

If yon have answered "Yes" to Question No. 42, then answer the following Question No. 56. Otherwise, do not answer Question No. 56.

QUESTION NO. 56

On what date did **J. Howard Marshall, III** discover, or should he have discovered in the exercise of ordinary diligence, that **J. Howard Marshall, II** had committed fraud against him?

Answer by stating the date:

Answer: _____

Go to Question No. 57.

QUESTION NO. 57

Do you find that **Pierce Marshall** acted in good faith and with just cause in defending **J. Howard Marshall II**'s December 22, 1992 Last Will for the purpose of having the Will admitted to probate?

The proponent of a will acts "in good faith and with just cause" if he acts under an honest and reasonable belief that the will is valid.

Answer "Yes" or "No."

Answer: Y

If you have answered "Yes" to Question No. 57, then go to Question No. 58. Otherwise, go to Question No. 59.

If your answer to Question No. 57 is "Yes", then answer the following Question No. 58. Otherwise, do not answer Question No. 58.

QUESTION NO. 58

What sum of money, if any, do you find from a preponderance of the evidence to be the necessary expenses and disbursements, including reasonable attorneys' fees, expenses and costs including fees paid to expert witnesses, incurred by **Pierce Marshall** in defending **J. Howard Marshall, II**'s December 22, 1992 Will for the purpose of having the Will admitted to probate?

In answering this question, you may consider the following factors as guides for determining a reasonable attorney's fee:

a. time and labor required;

b. the novelty and difficulty of the questions involved;

c. the requisite skills to perform the legal services properly;

d. the fee customarily charged in Harris County for similar legal services;

e. the experience, reputation, and ability of the lawyers performing the services; and

f. the nature of the fee arrangement between the party and their counsel.

Answer in dollars and cents, if any, for each of the following:

1. For legal services rendered for trial? 833K

2. For legal services on appeal to the Court of Appeals? 400K

3. For legal services on appeal to the Texas Supreme Court 89K

Go to Question No. 59.

QUESTION NO. 59

Do you find that trustees **Finley Hilliard** and **Ken Farrar** acted in good faith and with just cause in defending **J. Howard Marshall II**'s December 22, 1992 Will for the purpose of having the Will admitted to probate?

The proponent of a will acts "in good faith and with just cause" if he acts under an honest and reasonable belief that the will is valid.

Answer "Yes" or "No".

Answer: Y

If you answered "Yes" to Question No. 59, go to Question No. 60. Otherwise, go to Question No. 61.

If your answer is "Yes" to Question No. 59, then answer the following Question No. 60. Otherwise, do not answer Question No. 60.

QUESTION NO. 60

What sum of money, if any, do you find from a preponderance of the evidence to be necessary expenses and disbursements, including reasonable attorneys' fees, expenses and costs including fees paid to expert witnesses, incurred by trustees **Finley Hilliard** and **Ken Farrar** in defending **J. Howard Marshall, II**'s December 22, 1992 Will for the purpose of having the Will admitted to probate?

In answering this question, you may consider the following factors as guides for determining a reasonable attorney's fee:

a. time and labor required;

b. the novelty and difficulty of the questions involved;

c. The requisite skills to perform the legal services properly;

d. the fee customarily charged in Harris County for similar legal services;

e. the experience, reputation, and ability of the lawyers performing the services; and

f. the nature of the fee arrangement between the party and their counsel.

Answer in dollars and cents, if any, for each of the following:

1. For legal services rendered for trial? $ 147,500

2. For legal services on appeal to the Court of Appeals? $ 200,000

3. For legal services on appeal to the Texas Supreme Court $ 44,500

Go to Question No. 61.

QUESTION NO. 61

What sum of money, if any, do you find from a preponderance of the evidence to be the necessary expenses and disbursements, including reasonable attorneys' fees, expenses and costs; incurred by the Temporary Administrator, **Robert S. MacIntyre, Jr.**?

In answering this question, you may consider the following factors as guides for determining a reasonable attorney's fee:

a. time and labor required;

b. the novelty and difficulty of the questions involved;

c. the requisite skills to perform the legal services property;

d. the fee customarily charged in Harris county for similar legal services;

e. the experience, reputation, and ability of the lawyers performing the services; and

f. the nature of the fee arrangement between the party and their counsel.

Answer in dollars and cents, if any:

Answer: $1.2 mill.

Go to Question No. 62.

QUESTION NO. 62

Did **J. Howard Marshall, III** intentionally invade or interfere with a gift to the inheritance rights of any of the following parties without just cause or excuse?

Tortious interference with inheritance occurs when:

a. a party has an expectancy of inheritance or gift;

b. there is a reasonable certainty that the expectancy would have been realized, but for the interference;

c. the interference with the expectancy is intentional and without just or excuse;

d. the interference takes the form of conduct such as fraud, duress or undue influence; and

e. damages result from the interference.

Answer "Yes" or "No" for each party.

Answer for each:

1.	E. Pierce Marshall	Y
2.	Elaine Marshall	Y
3.	Preston Marshall	Y
4.	E. Pierce Marshall, Jr.	Y
5.	Marshall Museum and Library Trust	Y

If you answer "Yes" to any part of Question No. 62, go to Question No. 63. Otherwise, go to Question No. 66.

If your answer is "Yes" to any part of Question No. 62, then answer the same part of the following Question No. 63. Otherwise, do not answer Question No. 63.

QUESTION NO. 63

What sum of money, if paid now in cash, would fairly and reasonably compensate the following parties for any intentional interference found by you in answer to Question No. 66?

You may consider the following elements of damages and no others:

a. Actual pecuniary losses caused by the interference;

b. Consequential loss caused by the interference; and

c. Emotional distress reasonably expected to be caused by the interference.

Answer in dollars and cents, if any, for each party:

Answer:

1.	E. Pierce Marshall	$ 5.9 mil
2.	Elaine Marshall	$ 200K
3.	Preston Marshall	$ 200K
4.	E. Pierce Marshall, Jr.	$ 200K
5.	Marshall Museum and Library Trust	$ 5,400,000

Go to Question No. 64.

If you have answered "Yes" to any part of Question No. 62, then answer the same part following Question No. 64. Otherwise, do not answer Question No. 64.

QUESTION NO. 64

Do you find by clear and convincing evidence that the tortious interference with inheritance rights found by you in answer to Jury Question No. 67, if any, was committed by **J. Howard Marshall III** with malice?

"Malice" means:

(a) a specific intent by **J. Howard Marshall III** to cause substantial injury to **E. Pierce Marshall, Elaine Marshall, Preston Marshall, E. Pierce Marshall, Jr.**, or the **Marshall Museum and Library Trust**;

(b) an act or omission by **J. Howard Marshall, III**

(i) which, when viewed objectively from the standpoint of **J. Howard Marshall III** at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which **J. Howard Marshall III** had actual subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

Answer "Yes" or "No" for each party:

a.	E. Pierce Marshall	Y
b.	Elaine Marshall	Y
c.	Preston Marshall	Y
d.	E. Pierce Marshall, Jr.	Y
e.	Marshall Museum and Literary Trust	Y

If your answer is "Yes" to any part of Question No. 64, go to Question No. 65. Otherwise, go to Question No. 66.

If you have answered "Yes" to any part of Question No. 64, then answer the same part of following Question No. 65. Otherwise, do not answer Question No. 65.

QUESTION NO. 65

What sum of money, if any, should be awarded as exemplary damages to **E. Pierce Marshall, Elaine Marshall, Preston Marshall, E. Pierce Marshall, Jr.** or the **Marshall Museum and Library Trust** against **J. Howard Marshall, III** for the conduct found by you in Question No. 62.

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are:

a) The nature of the wrong;

b) The character of the conduct involved;

c) The degree of culpability of the wrongdoer;

d) The situation and sensibilities of the parties concerned; and,

e) The extent to which such conduct offends a public sense of justice and propriety.

f) The size of an award needed to deter similar conduct in the future. Answer dollars and cents, if any, for each party:

a.	E. Pierce Marshall	$ 6 mil
b.	Elaine Marshall	$ 500K
c.	Preston Marshall	$ 200K
d.	E. Pierce Marshall, Jr.	$ 200K
e.	Marshall Museum and Literary Trust	$ 3,600,000

Go to Question No. 66.

QUESTION NO. 66

Do you find that **Vickie Lynn Marshall** did not have an agreement with **J. Howard Marshall, II**, that he would give her one-half of all of his property?

Answer "We do so find" or "We do not so find".

Answer: We do so find

Go to Question No. 67.

QUESTION NO. 67

Did **J. Howard Marshall, III** commit fraud against **Bettye B. Marshall**?

"Fraud" occurs when:

a. party makes a material misrepresentation;

b. the misrepresentation is made with the knowledge of its falsity or made recklessly without any knowledge of the truth and as a positive assertion;

c. the misrepresentation is made with the intention that it should be acted upon by the other party; and

d. the other party acts in reliance on the misrepresentation and thereby suffers injury.

"Misrepresentation" means a false statement of fact, or a promise of future performance made with an intent not to perform as promised.

"Fraud" also occurs when:

a. a party conceals or fails to disclose a material fact within the knowledge of that party;

b. the party knows that the other party is ignorant of the fact and does not have an equal opportunity to discover the truth;

c. the party intends to induce the other party to take some action by concealing or failing to disclose the fact; and,

d. the other party suffers injury, as a result of acting without knowledge of the undisclosed fact.

Answer "Yes" or "No."

Answer: Y

If you answer "Yes" to Question No. 67, then go to Question No. 68. Otherwise, go to Question No. 73.

If your answer is "Yes" to Question No. 67, then answer the following Question No. 68. Otherwise, do not answer Question No. 68.

QUESTION NO. 68

Did **J. Howard Marshall, III** fraudulently conceal his fraud until he filed this lawsuit?

Answer "Yes" or "No".

Answer: Y

If you answer "Yes" to Question No. 67, then go to Question No. 69. Otherwise, go to Question No. 73.

If your answer is "Yes" to Question No. 67, then answer the following Question No. 69. Otherwise, do not answer Question No. 69.

QUESTION NO. 69

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the **Bettye B. Marshall Trusts** for the damages, if any, that resulted from the fraud that damaged **Bettye B. Marshall**?

Consider the following element of damages, if any, and none other:

> The difference, if any, between the value of the benefits to **Bettye B. Marshall** agreed to by the parties and the value of the benefits to **Bettye B. Marshall** actually provided by **J. Howard Marshall, II**.

Answer in dollars and cents, if any.

Answer: $4 mill

If your answer is "Yes" to Question No. 67, then go to Question No. 70. Otherwise, go to Question No. 73.

If your answer is "Yes" to Question No. 67, then answer the following Question No. 70. Otherwise, do not answer Question No. 70.

QUESTION NO. 70

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate the **Bettye B. Marshall Trusts** for the additional damages, if any, that were proximately caused by **Howard Marshall, III**'s fraud on **Bettye B. Marshall**?

Do not consider any amount that you have awarded for the fraud in a prior answer.

Answer in dollars and cents, if any.

Answer: 0

If your answer is "Yes" to Question No. 67, then go to Question No. 71. Otherwise, go to Question No. 73.

If you have answered "Yes" to Question No. 67, then answer the following Question No. 71. Otherwise, do not answer Question No. 71.

QUESTION NO. 71

Do you find by clear and convincing evidence that the fraud found by you in answer to Jury Question No. 67, if any, was committed by **J. Howard Marshall III** with malice?

"Malice" means:

(a) a specific intent by **J. Howard Marshall III** to cause substantial injury to **Bettye B. Marshall**;

(b) an act or omission by **J. Howard Marshall, III**

(i) which, when viewed objectively from the standpoint of **J. Howard Marshall III** at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

(ii) of which **J. Howard Marshall III** had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.

Answer "Yes" or "No":

Betty B. Marshall Y

If your answer is "Yes" to Question No. 71, go to Question No. 72. Otherwise, go to Question No. 73.

If you have answered "Yes" to Question No. 71, then answer the following Question No. 72. Otherwise, do not answer Question No. 72.

QUESTION NO. 72

What sum of money, if any, should be awarded as exemplary damages to **Bettye B. Marshall Trust** against **J. Howard Marshall, III** for the conduct found by you in Question No. 67.

"Exemplary damages" means an amount that you may in your discretion award as a penalty or by way of punishment.

Factors to consider in awarding exemplary damages, if any, are:

a) The nature of the wrong;

b) The character of the conduct involved;

c) The degree of culpability of the wrongdoer;

d) The situation and sensibilities of the parties concerned; and,

e) The extent to which such conduct offends a public sense of justice and propriety.

f) The size of an award needed to deter similar conduct in the future.

g) The net worth of J. Howard Marshall, III.

Answer dollars and cents, if any:

Betty B. Marshall $ 6 mill.

Go to Question No. 73.

QUESTION NO. 73

Did **J. Howard Marshall III** sell stock to **Bettye B. Marshall** by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading?

Answer "Yes" or "No".

Answer: N

If your answer to Question No. 73 is "Yes", go to Question No. 74. Otherwise, go to Question No. 76.

If your answer is "Yes" to Question No. 73, then answer the following Question No. 74. Otherwise, do not answer Question No. 74.

QUESTION NO. 74

What amount of money did **Bettye B. Marshall** pay to **J. Howard Marshall, III** for the stock?

Answer in dollars and cents, if any.

Answer: $_____

If your answer to Question No. 73 is "Yes", go to Question No. 75. Otherwise, go to Question No. 76.

If your answer is "Yes" to Question No. 73, then answer the following Question No. 75. Otherwise, do not answer Question No. 75.

QUESTION NO. 75

What was the value of the stock purchased from **J. Howard Marshall, III** at the time **J. Howard Marshall, II** and **Bettye B. Marshall** disposed of it?

Answer in dollars and cents, if any.

Answer: $_____

Go to Question No. 76.

QUESTION NO. 76

Do you find that **Betty B. Marshall** or **E. Pierce Marshall**, as Trustee of the **Bettye Marshall Trust**, unreasonably delayed in asserting their claims against **J. Howard Marshall, III**?

A party unreasonably delays asserting his rights if the delay causes of good faith change of position by the other party to his detriment.

Answer "Yes" or "No."

Answer: ___N___

Go to Question No. 77.

QUESTION NO. 77

What is the earliest date upon which either **Bettye B. Marshall** or **E. Pierce Marshall, Trustee** of the **Bettye B. Marshall Trust**, discovered or should have discovered, in the exercise of ordinary diligence, that **J. Howard Marshall, III** had committed securities fraud against **Bettye B. Marshall**?

Answer by stating the date.

Answer: Jan. 96

Go to Question No. 78.

QUESTION NO. 78

Did **J. Howard Marshall III** waive his claims, if any, against **J. Howard Marshall II** after December 2, 1980?

"Waiver" means the intentional surrender of a known right or intention [sic] conduct inconsistent with claiming that right if made after receipt of full disclosure of all material information.

Answer "Yes" or "No".

Answer: Y

Go to Question No. 79.

QUESTION NO. 79

Do you find that **J. Howard Marshall III** is estopped from asserting the claims he has made against **J. Howard Marshall II** or **E. Pierce Marshall**?

A person is estopped if, after full disclosure of all material facts, he acts or fails to act with the intention that another rely on such action or inaction, and if such other person does in good faith rely to his detriment on the acts or inactions of the first person.

Answer "Yes" or "No" as to each party:

Answer:

Claims against **J. Howard Marshall II** ___Y___

Claims against **E. Pierce Marshall** ___Y___

Go to Question No. 80.

QUESTION NO. 80

Do you find that **J. Howard Marshall III** unreasonably delayed in asserting his claims against **J. Howard Marshall II** or **E. Pierce Marshall**?

A party unreasonably delays asserting his rights if the delay causes a good faith change of position by the other party to his detriment.

Answer "Yes" or "No" as to each party:

Answer:

Claims against **J. Howard Marshall II** ___Y___

Claims against **E. Pierce Marshall** ___Y___

Go to Question No. 81.

QUESTION NO. 81

Do you find that in making his claims against **J. Howard Marshall II** and **E. Pierce Marshall**, **J. Howard Marshall III** has acted with unclean hands?

A person acts with unclean hands if he attempts to obtain the benefit of the results of his own fraud, dereliction of duty, violation of law, wrongful conduct or other inequitable conduct in the transaction in question.

Answer "Yes" or "No."

Answer: Y

After you retire to the jury room, you will select your own presiding juror. The first thing the presiding juror will do is to have this complete charge read aloud and then you will deliberate upon your answers to the question asked.

It is the duty of the presiding juror –

1. To preside during your deliberations.
2. To see that your deliberations are conducted in an orderly manner and in accordance with the instructions in this charge.
3. To write out and hand to the bailiff any communications concerning the case that you desire to have delivered to the judge.
4. To vote on the questions.
5. To write your answers to the questions in the spaces provided, and
6. To certify to your verdict in the space provided for the presiding juror's signature or to obtain the signatures of all the jurors who agree with the verdict if your verdict is less than unanimous.

You should not discuss the case with anyone, not even with other members of the jury, unless all of you are present and assembled in the jury room. Should anyone attempt to talk to you about the case before the verdict is

returned, whether at the courthouse, at your home, or elsewhere, please inform the Judge of this fact.

When you have answered all the questions you are required to answer under the instructions of the Judge and your presiding juror has placed your answers in the spaces provided and signed the verdict as presiding juror or obtained the signatures, you will inform the bailiff at the door of the jury room that you have reached a verdict, and then you will return into Court with your verdict.

/s/ Mike Wood
JUDGE PRESIDING

CERTIFICATE

We, the jury, have answered the above and foregoing questions as herein indicated, and herewith return same into Court as our verdict.

(To be signed by the presiding juror if unanimous.)

/s/ [Illegible]
PRESIDING JUROR

(To be signed by those rendering the verdict if not unanimous.)

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

RECORDERS MEMORANDUM

ALL [Illegible], ADDITIONS, AND [Illegible] WERE PRESENT AT THE TIME THE INSTRUMENT WAS FILED, AND RECORDED.

NO. 276,815-402

ESTATE OF J. HOWARD MARSHALL, II, DECEASED	§	**IN THE PROBATE COURT**
J. HOWARD MARSHALL, III, *et al.*	§	
Plaintiffs	§	
v.	§	**NUMBER TWO (2) OF**
ROBERT S. MACINTYRE, JR. AS TEMPORARY ADMINISTRATOR OF THE ESTATE OF J. HOWARD MARSHALL, II, *et al.*	§	
Defendants	§	**HARRIS COUNTY, TEXAS**

SECOND MODIFIED FINAL JUDGMENT

(Filed Dec. 7, 2001)

BE IT REMEMBERED that on the 18th day of September 2000, came onto be heard in due order and time the above-styled and numbered cause. The Court received the jury's verdict herein on the 7th day of March 2001, and the Court here and now renders its judgment on the verdict pursuant to TEX. R. CIV. P. 300.

1. APPEARANCES

1.1. The plaintiff and counterdefendant J. HOWARD MARSHALL III appeared in person and by attorney of record and announced ready for trial on his Fourth Amended Consolidated Petition as supplemented by his Second Amended Supplement to Fourth Amended Consolidated Petition and his Response to Counterclaims and Claim for Indemnity. The plaintiff and counterdefendant

VICKIE LYNN MARSHALL appeared in person and by attorney of record and announced ready for trial on her Fifth Amended Consolidated Petition and Will Contest.

1.2. The defendant ROBERT S. MACINTYRE JR. appeared in person and as the court-appointed temporary administrator for the Estate of J. HOWARD MARSHALL II, deceased, and announced ready for trial on his Amended Original Answer to the Consolidated Actions of Howard Marshall, III and Vickie Marshall.

1.3.1. The defendant and counterclaimant E. PIERCE MARSHALL, individually, as will proponent, as co-trustee of the Marshall Grandchildren's Trust for the Benefit of E. Pierce Marshall Jr., as co-trustee of the Marshall Grandchildren's Trust for the Benefit of Preston Marshall, and as Trustee of the Marshall Petroleum, Inc., Stock Holding Trust, appeared in person and by attorney of record and announced ready for trial on his Second Amended Original Answer to Plaintiffs' Pleadings, his Affirmative Claims, and his Affirmative Clams against Vickie Marshall.

1.3.2. The defendant and counterclaimant ELAINE MARSHALL, individually, as co-trustee of the Marshall Grandchildren's Trust for the Benefit of E. Pierce Marshall Jr., and as co-trustee of the Marshall Grandchildren's Trust for the Benefit of Preston Marshall, appeared in person and by attorney of record and announced ready for trial on her Second Amended Original Answer to Plaintiffs' Pleadings, her Affirmative Claims, and her Affirmative Claims against Vickie Marshall.

1.3.3. The defendant and counterclaimant E. PIERCE MARSHALL JR. appeared in person and by attorney of record and announced ready for trial on his Second Amended Original Answer to Plaintiffs' Pleadings,

his Affirmative Claims, and his Affirmative Claims against Vickie Marshall.

1.3.4. The defendant and counterclaimant PRESTON MARSHALL appeared in person and by attorney of record and announced ready far trial on his Second Amended Original Answer to Plaintiffs' Pleadings, his Affirmative Claims, and his Affirmative Claims against Vickie Marshall.

1.3.5. The defendants and counterplaintiff's named in this Paragraph 1.3. are sometimes collectively referred to in this judgment as the "Marshall Family Defendants."

1.4. The defendants MARSHALL PETROLEUM, INC., and TROF, INC., appeared by duly authorized representative and by attorney of record and announced ready for trial on their First Amended Answer to Plaintiffs' Petitions and Affirmative Claims.

1.5. The defendant and counter-claimant FINLEY HILLIARD individually, as trustee of the J. Howard Marshall, II, Living Trust; as trustee of the Marshall Petroleum, Inc., Stock Holding Trust; as trustee of the Grantor Retained Annuity Trust; as trustee of the J. Howard Marshall Charitable Lead Trust; as trustee of the J. Howard Marshall, II, Liquidating Trust Number Two; and as trustee of the J. Howard Marshall, Family Trust, appeared in person and by attorney of record and announced ready for trial on his First Amended Answer to Plaintiffs' Claims and Affirmative Claims.

1.6. The defendant and counterclaimant KEN FARRAR, as trustee of the J. Howard Marshall, II, Living Trust: as trustee of the J. Howard Marshall, II, Liquidating Trust Number One; and as trustee of the J. Howard

Marshall, II, Family Trust, appeared in person and by attorney of record and announced ready for trial on his First Amended Answer to Plaintiffs' Claims and Affirmative Claims.

1.7. The defendants HARVEY R. SORENSEN and FOULSTON & SIEFKIN, L.L.P., appeared in person and by attorney of record and announced ready for trial on their Second Amended Answer.

1.8. The defendant ELEANOR PIERCE STEVENS, acting in her capacity as successor co-trustee of the Marshall Petroleum, Inc., Stock Holding Trust, appeared by attorney of record and announced ready for trial on her Original Answer.

1.9. The defendant and counterclaimant E. PIERCE MARSHALL, acting as trustee of the Marshall Museum and Library Trust, appeared in person and by attorney of record and announced ready for trial on his Consolidated Amended Answer and Affirmative Defenses to Plaintiffs' Petitions.

1.10. The defendant and counterclaimant DR. STEPHEN COOK, who is sometimes improperly named as Dr. Steven Cook, acting as trustee of the Marshall Museum and Library Trust, appeared in person and by attorney of record and announced ready for trial on his First Amended Consolidated Counterclaims.

1.11.1. The defendant and counterclaimant E. PIERCE MARSHALL, acting as trustee of the Bettye B. Marshall Living Trust, which is sometimes referred to as the Bettye B. Marshall Estate Trust, appeared in person and by attorney of record and announced ready for trial on his Consolidated Amended Answer and Affirmative Defenses

to Plaintiffs' Petitions and First Amended Consolidated Counterclaims.

1.11.2. The defendant and counterclaimant E. PIERCE MARSHALL, acting as trustee of the J. Howard Marshall, II, Marital Trust Number Two, appeared in person and by attorney of record and announced ready for trial on his Amended Answer and Counterclaim.

1.11.3. The defendant and counterclaimant E. PIERCE MARSHALL, acting as trustee of the E. Pierce Marshall Family Trust created under the Bettye B. Marshall Living Trust Indenture dated October 30, 1990, appeared in person and by attorney of record and announced ready for trial on his Amended Answer and Counterclaim.

1.11.4. The defendants and counterplaintiffs named in this Paragraph 1.11. are sometimes collectively referred to in this judgment as the "Bettye B. Marshall Trusts."

2. DISPOSITIONS PRIOR TO TRIAL

2.1. Prior to trial and during the trial, the Court was informed of a written settlement agreement between the plaintiff VICKIE LYNN MARSHALL and the defendant EDWIN K. HUNTER, in which these two parties agreed to the settlement of any and all claims by VICKIE LYNN MARSHALL against EDWIN K. HUNTER. The Court here and now renders judgment of dismissal with prejudice of all claims asserted by VICKIE LYNN MARSHALL against EDWIN K. HUNTER.

2.2. Prior to and during the trial, the Court was informed of a written settlement agreement between the plaintiff J. HOWARD MARSHALL III and the defendants

FINLEY HILLIARD, individually, and KEN FARRAR, individually, in which these parties agreed to the settlement of any and all claims against FINLEY HILLIARD, individually, and KEN FARRAR, individually. The Court here and now renders judgment of dismissal with prejudice of all claims asserted by J. HOWARD MARSHALL III against FINLEY HILLIARD, individually, and KEN FARRAR individually.

2.2.1. Prior to trial and during the trial, the Court was informed of a written settlement agreement between the plaintiff J. HOWARD MARSHALL III and defendants FINLEY HILLIARD, as trustee, KEN FARRAR, as trustee, and MILFORD, HILLIARD AND FARRAR, P.C., in which these parties agreed to the settlement of any and all claims by J. HOWARD MARSHALL III against FINLEY HILLIARD, as trustee, KEN FARRAR, as trustee, and MILFORD, HILLIARD AND FARRAR, P.C., on account of or arising out of (a) any and all acts of misfeasance or nonfeasance by them; (b) all acts or omissions, whether such acts or omissions constitute any form of negligence or any form of intentional conduct by them; (c) any claim for breach of any duty or obligation to J. HOWARD MARSHAL III, or to any other person or entity for which J. HOWARD MARSHALL III might assert a claim against them; (d) any claim for error or omission in the rendering of or failure to render any services as trustees or accountants by them; (e) any claim for breach of trust or fiduciary duty by them to any person, entity, or trust. The parties expressly agreed that J. HOWARD MARSHALL III could maintain and continue to assert claims against FINLEY HILLIARD, as trustee, and KEN FARRAR, as trustee, but only because, as trustees, they are necessary parties to claims or causes of action seeking to establish a right in or

to the assets of the trusts for which they are trustees. The Court here and now renders judgment of dismissal with prejudice of all claims asserted by J. HOWARD MARSHALL III against FINLEY HILLIARD, as trustee, KEN FARRAR, as trustee, and MILFORD, HILLIARD AND FARRAR, P.C., because of any act or failure to act on the part of FINLEY HILLIARD, as trustee, or KEN FARRAR, as trustee.

2.3. Prior to the cause being called to trial, the defendants HARVEY SORENSEN, individually, and FOULSTON & SIEFKIN, L.L.P., moved for summary judgment that the plaintiff J. HOWARD MARSHALL III take nothing on his claims asserted in this action arising out of or relating to ELEANOR PIERCE STEVENS' estate, her estate planning, or her property. The Court, having received the summary judgment evidence and having heard the arguments of counsel, rendered an interlocutory judgment on the 7th day of June 1999 that J. HOWARD MARSHALL III take nothing on all claims asserted in this matter arising out of or related to the estate, the estate planning or the property of ELEANOR PIERCE STEVENS. The Court here and now makes its prior interlocutory order FINAL,

2.4. Prior to the cause being called to trial, the intervenor ELEANOR PIERCE STEVENS moved for summary judgment that the plaintiff J. HOWARD MARSHALL III take nothing on his claims asserted in this action arising out of or relating to ELEANOR PIERCE STEVENS' estate, her estate planning, or her property. The Court, having received the summary judgment evidence and having heard the argument of counsel, rendered an interlocutory judgment on the 9th day of August 1999 that J. HOWARD MARSHALL III take nothing on all

claims asserted in this matter arising out of or related to the estate, the estate planning, or the property of ELEANOR PIERCE STEVENS. The Court here and now makes its prior interlocutory order FINAL.

2.5. Prior to the cause being called to trial, the defendant EDWIN K. HUNTER moved for summary judgment against the plaintiff J. HOWARD MARSHALL III. The Court, having received the summary judgment evidence and having heard the argument of counsel, rendered an interlocutory judgment on the 10th day of November 1999 that J. HOWARD MARSHALL III take nothing on all claims asserted in this action against EDWIN K. HUNTER. Prior to trial and during the trial, the Court was informed of a written settlement agreement between the plaintiff J. HOWARD MARSHALL III and the defendant EDWIN K. HUNTER, in which these two parties agreed to the entry of a take-nothing judgment in favor of EDWIN K. HUNTER. The Court here and now makes its prior interlocutory order FINAL and renders judgment in accordance with the settlement agreement.

2.6. Prior to the cause being called to trial, the Marshall Family Defendants, including E. PIERCE MARSHALL, a resident of Dallas County, Texas, sought probate of a certain instrument in writing dated the 11th day of June 1993, said original instrument being on file herein and purporting and alleged to be the Codicil to Last Will and Testament of J. Howard Marshall, II. In addition, the Marshall Family Defendants, including E. PIERCE MARSHALL, sought probate of a certain instrument in writing dated the 22nd day of December 1992, said original instrument being on file herein and purporting and alleged to be the Last Will and Testament of J. Howard

Marshall, II. In connection with the application for probate of these instruments, the Marshall Family Defendants named and provided notice to all interested parties, including VICKIE LYNN MARSHALL. Pursuant to a motion for summary judgment filed on behalf of the Marshall Family Defendants that was granted on the 24th day of February 2000, the Court decreed the following: (1) that J. HOWARD MARSHALL II died on the 4th day of August 1995; (2) that the purported Codicil to Last Will and Testament of J. Howard Marshall, II, dated on the 11th day of June 1993, and the purported Last Will and Testament of J. Howard Marshall, II, dated the 22nd day of December 1992, were submitted for probate prior to the passage of four (4) years of time since the date of testator's death, (3) that the Court has jurisdiction and venue over the Estate of J. HOWARD MARSHALL II, deceased, this probate proceeding, and the subject matter of this proceeding ancillary to probate; (4) that all citations and processes required by law for probate were duly issued, served, and returned in the manner and for the length of time required by law; (5) that E. PIERCE MARSHALL is named as executor in said documents; (6) that J. HOWARD MARSHALL II was over ninety (90) years of age at the time of his death; (7) that the said purported testamentary documents were executed by J. HOWARD MARSHALL II and the witnesses thereto with the formalities and solemnities and under the circumstances required by law to make them a valid codicil and valid will; and (8) that the said documents had not been revoked by J. HOWARD MARSHALL II.

2.7. Prior to this cause being called to trial, the Marshall Family Defendants moved for summary judgment seeking a decree concerning certain aspects of the J.

Howard Marshall, II, Living Trust, formed originally pursuant to the Living Trust Indenture dated on the 1st day of September 1982. On the 24th day of February 2000, the Court rendered its partial summary judgment regarding this trust and decreed as follows: (1) that the J. Howard Marshall, II, Living Trust was executed and sufficiently funded by J. HOWARD MARSHALL II in 1982 under the applicable Texas law; (2) that the change of sites of the J. Howard Marshall, II, Living Trust to Louisiana did not make the J. Howard Marshall, II, Living Trust invalid; (3) that the provisions of the J. Howard Marshall, II, Living Trust do not violate the laws of the State of Louisiana; and (4) that, in any event, the invalidity of certain provisions of the J. Howard Marshall, II, Living Trust as alleged by J. HOWARD MARSHALL III and VICKIE LYNN MARSHALL is not a basis for Invalidating the entire J. Howard Marshall, II, Living Trust. It appears to the Court that its prior interlocutory order should be, and hereby is, made FINAL.

2.8. The defendants CHARLES KOCH and DON CORDES moved for summary judgment against plaintiff, J. HOWARD MARSHALL III; and the Court, having received the summary judgment evidence and having heard the argument of counsel, rendered summery judgment in favor of CHARLES KOCH and DON CORDES on the 12th day of September 2000. It appears to the Court that its prior interlocutory order should be, and hereby is, made FINAL.

2.9. Prior to this cause being called to trial, the defendant KOCH INDUSTRIES, Inc. moved for summary judgment against J. HOWARD MARSHALL III; and the Court, having received the summary judgment evidence and having heard the argument of counsel, rendered an

interlocutory take-nothing judgment against J. HOWARD MARSHALL III on the 6th day of December 1999. The Court here and now makes its prior interlocutory order FINAL.

3. TRIAL OF THE CASE

3.1. This Court has exclusive and dominant jurisdiction over (1) all claims regarding the property owned by J. Howard Marshall II; (2) the Last Will and Testament of J. Howard Marshall II, dated the 22nd day of December 1992; (3) the Codicil to Last Will and Testament of J. Howard Marshall II, dated the 11th day of June 1993; (4) the Amended and Restated Living Trust Indenture dated the 13th day of July 1994; (5) all prior wills, codicils, and trusts executed by J. Howard Marshall II; (6) all affirmative claims and all filed and possible compulsory counterclaims raised by J. HOWARD MARSHALL III and VICKIE LYNN MARSHALL; and (7) all plaintiffs' and defendants' claims raised and that could have been raised against the Estate of J. Howard Marshall II, concerning the making of any *inter vivos* or testamentary gift or transfer by J. Howard Marshall II of any of his property.

3.2. At the conclusion of the evidence presented in the case-in-chief of the plaintiff and counterdefendant J. HOWARD MARSHALL III, the defendants HARVEY R. SORENSEN and FOULSTON & SIEFKIN, L.L.P., moved pursuant to TEX. R. CIV. P. 268 for a directed verdict. On the 17th day of January 2001, the Court, having considered the motion, the argument of counsel, and the record, rendered judgment as a matter of law in favor of HARVEY SORENSEN and FOULSTON & SIEFKIN, L.L.P., for the reason that there was no evidence of probative force to

support any material issue against HARVEY SORENSEN and FOULSTON & SIEFKIN, L.L.P., and for the reason that HARVEY SORENSEN and FOULSTON & SIFFKIN, L.L.P., established their right to judgment as a matter of law.

3.2.1. It is therefore ORDERED, ADJUDGED, and DECREED by the Court that Plaintiff J. HOWARD MARSHALL III take nothing by his suit against HARVEY SORENSEN and FOULSTON & SIEFKIN, L.L.P.

3.3. At the conclusion of all the evidence, the Marshall Family Defendants, acting as will proponents, moved for a directed verdict on the issue of nonrevocation of the Last Will and Testament of J. Howard Marshall, II, dated the 22nd day of December 1992. The Court, having considered the motion, rendered judgment as a matter of law in favor of the Marshall Family Defendants for the reason that nonrevocation of this instrument was established as a matter of law.

3.4. On the 5th day of January 2001, VICKIE LYNN MARSHALL filed of record in this Court a voluntary nonsuit of all claims against all defendants. Thereafter, VICKIE LYNN MARSHALL brought no additional claims against any party in this Court. Further, the Marshall Family Defendants, the Bettye B. Marshall Trusts, and Dr. Stephen Cook, trustee of the Marshall Museum and Library Trust announced on the record to the Court that, pursuant to an order of the Honorable Samuel L. Bufford, Bankruptcy Court of the Central District of California, in which that Bankruptcy Court ruled it would bring contempt proceedings against these defendants if they proceeded with their counterclaims for damages is this Court, the Marshall Family Defendants, the Bettye B. Marshall

Trusts, and Dr. Stephen Cook, as trustee of the Marshall Museum and Library Trust, requested and received leave of Court, to amend their counterclaims and to nonsuit without Prejudice all affirmative claims against VICKIE LYNN MARSHALL. This action left pending their claims for declaratory judgment, sanctions pursuant to TEX. R. CIV. P. 13 and TEX. CIV. PRAC. & REM. CODE ANN. §§ 10.001-.006 (Vernon Supp. 2001), the application for probate of the Codicil to the Last Will and Testament of J. Howard Marshall II dated the 11th day of June 1993, and the application for probate of the Last Will and Testament of J. Howard Marshall, II, dated the 22nd day of December 1992, in which VICKIE LYNN MARSHALL was named as, and appeared as, an interested party. VICKIE LYNN MARSHALL remained a counterdefendant for purposes of the declaratory judgment claim and the TEX. R. CIV. P. 13 sanctions claim.

3.5. A jury having been previously demanded in due time, there came a jury of twelve good and lawful men and women, who, being duly impaneled and sworn, heard the evidence and the argument of counsel. On the 1st day of March 2001, the Court submitted the questions of fact in the cause to the jury. On the 7th day of March 2001, the jurors on their oaths did return their unanimous verdict, in response to the questions set forth on Exhibit A attached hereto and made a part hereof for all purposes.:

3.6. The jury's findings were received by the Court as a verdict and, upon motion made, were accepted, filed, and entered of record on the minutes of the Court. Because it appears to the Court that the verdict of the jury was in favor of all defendants and against the plaintiffs and counterdefendants J. HOWARD MARSHALL III and VICKIE LYNN MARSHALL, judgment should be, and

here and now is, rendered in part on the verdict in favor of the defendants, will proponents, and counterplaintiffs.

3.7. The Court finds that its prior interlocutory order with respect to all issues regarding admission of the Last Will and Testament of J. Howard Marshall, II, dated the 22nd day of December 1992, and the Codicil to Last Will and Testament of J. Howard Marshall, II, dated the 11th day of June 1993, should be, and the same is, made FINAL.

3.8. The Court further finds, after the Court's consideration of the jury's findings on testamentary capacity and undue influence, that the Last Will and Testament of J. Howard Marshall II, dated the 22nd day of December 1992, and the Codicil to Last Will and Testament of J. Howard Marshall II, dated the 11th day of June 1993, are genuine, were validly executed by J. Howard Marshall II as a competent adult possessing sound mind, mental capacity, and testamentary capacity; were not the product of undue influence or any other tortious act, and are otherwise qualified in all respects for admission to probate by this Court.

3.9. The Court further finds that E. PIERCE MARSHALL is entitled by law to letters testamentary, is willing to accept the trust and to qualify according to law, and is not disqualified from accepting such letters.

3.10. The Court further finds that the purported Last Will and Testament of J. Howard Marshall, II, dated the 22nd day of December 1992, provides that no other action shall be required or had in the courts in relation to the settlement of such estate other than the probating and recording of such Last Will.

3.11. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that the contest by J. HOWARD MARSHALL III of the Codicil to Last Will and Testament of J. Howard Marshall, II, dated on the 11th day of June 1993, and the contest of the alleged Last Will and Testament of J. Howard Marshall, II, dated the 22nd day of December 1992, are hereby DENIED AND OVERRULED;

3.12 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the Codicil to Last Will and Testament of J. Howard Marshall, II dated the 11th day of June 1993 and the Last Will and Testament of J. Howard Marshall, II dated the 22nd day of December 1992, be and the same hereby are, admitted to probate and that the Clerk of this Court is ORDERED to record said Codicil and Will together with the previously filed Application for Probate in the Minutes of this Court;

3.13. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that no bond or other security is required and that, upon taking and filing the oath required by law, letters testamentary shall be issued to E. PIERCE MARSHALL, who is hereby APPOINTED by the Court as Independent Executor of J. Howard Marshall II's will and estate, and that no other actions shall be had in this Court other than the return of the inventory, appraisement, and list of claims as required by law;

3.14. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that no interested person has applied for the appointment of appraiser and none is deemed necessary by the Court; and

3.15. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that plaintiff J. HOWARD MARSHALL III take nothing by this suit from any of the following persons and/or legal entities:

1. E. Pierce Marshall;
2. Elaine Marshall;
3. E. Pierce Marshall Jr.;
4. Preston Marshall;
5. Finley Hilliard;
6. Robert S. MacIntyre Jr. as the court-appointed temporary administrator of the Estate of J. Howard Marshall II;
7. E. Pierce Marshall as co-trustee of the Marshall Grandchildren's Trust for the Benefit of E. Pierce Marshall Jr.;
8. E. Pierce Marshall as co-trustee of the Marshall Grandchildren's Trust for the Benefit of Preston Marshall;
9. E. Pierce Marshall as trustee of the Marshall Petroleum, Inc., Stock Holding Trust;
10. E. Pierce Marshall as trustee of the Marshall Museum and Library Trust;
11. E. Pierce Marshall as trustee of the Bettye B. Marshall Estate Trust;
12. E. Pierce Marshall as trustee of the J. Howard Marshall, II, Marital Trust Number Two;
13. E. Pierce Marshall as trustee of the E. Pierce Marshall Family Trust created under the Bettye B. Marshall Living Trust Indenture dated October 30, 1990;

14. Finley Hilliard as trustee of the J. Howard Marshall, II, Living Trust;

15. Finley Hilliard as trustee of the Marshall Petroleum, Inc., Stock Holding Trust;

16. Finley Hilliard as trustee of the Grantor Retained Annuity Trust;

17. Finley Hilliard as trustee of the J. Howard Marshall Charitable Lead Trust;

18. Finley Hilliard as trustee of the J. Howard Marshall, II, Liquidating Trust Number Two;

19. Finley Hilliard as trustee of the J. Howard Marshall II Family Trust;

20. Ken Farrar as trustee of the J. Howard Marshall, II, Living Trust;

21. Ken Farrar as trustee of the J. Howard Marshall, II, Liquidating Trust Number One;

22. Ken Farrar as trustee of the J. Howard Marshall, II, Family Trust;

23. Elaine Marshall as co-trustee of the Marshall Grandchildren's Trust for the Benefit of E. Pierce Marshall Jr.;

24. Elaine Marshall as co-trustee of the Marshall Grandchildren's Trust for the Benefit of Preston Marshall;

25. Marshall Petroleum, Inc.;

26. Trof, Inc.;

27. Eleanor Pierce Stevens as successor co-trustee of the Marshall Petroleum, Inc., Stock Holding Trust; and

28. Dr. Stephen Cook, sometimes improperly named as Dr. Steven Cook, as trustee of the Marshall Museum and Library Trust.

3.16. It appears to the Court that plaintiff J. HOWARD MARSHALL III named the following persons as interested parties to this suit:

1. Vickie Lynn Marshall;
2. Dan Manning;
3. Mabel H. Bohannan;
4. Ada Estes;
5. Gladys Estes;
6. James W. Lee;
7. Haverford College;
8. George School;
9. Judy Wilson;
10. Carolyn Lee; and
11. Kay Lee Rains.

3.17. The Court finds further that plaintiff J. HOWARD MARSHALL III joined these persons by service and that these persons appeared, and that J. HOWARD MARSHALL III, pursued no affirmative claim against these persons at trial or by submission of issues to the jury . The Court further finds that these interested parties are entitled to judgment with respect to any claim that could have been brought by J. HOWARD MARSHALL III against any of them in this cause.

3.18. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that J. HOWARD MARSHALL III take nothing by this suit against Vickie Lynn

Marshall, Dan Manning, Mabel Bohannan, Ada Estes, Gladys Estes, James W. Lee, Haverford College, George School, Judy Wilson, Carolyn Lee, and Kay Lee Rains and that said alleged interested parties take nothing by this suit.

3.19. The Court finds that its prior interlocutory order with respect to the J. Howard Marshall, II, Living Trust should be, and the same is hereby, made FINAL. After the Court's consideration of the jury's findings with respect to the issues of mental capacity and undue influence that the J. Howard Marshall, II, Living Trust is valid, the Court finds that J. HOWARD MARSHALL II did not lack mental capacity when he executed the J. Howard Marshall, II, Living Trust, and that it was not the product of undue influence.

3.20. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that the Amended and Restated Living Trust Indenture dated the 13th day of July 1994 was not executed ay J. HOWARD MARSHALL II when he lacked the requisite mental capacity and was not the result if undue influence; and

3.21. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the J. Howard Marshall, II, Living Trust Indenture was executed and sufficiently funded by J. HOWARD MARSHALL II in 1982 pursuant to all applicable laws of the State of Texas; that the change of situs of the J. Howard Marshall, II, Living Trust to Louisiana did not make the J. Howard Marshall, II Living Trust invalid; that the provisions and establishment of the J. Howard Marshall, II, Living Trust did not violate any of the laws of the State of Louisiana; and that, in any event, the bases for asserting the invalidity of

certain provisions of the J. Howard Marshall, II, Living Trust herein by J. HOWARD MARSHALL III and VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, are not grounds for invalidating the entire J. Howard Marshall, II, Living Trust.

3.22. The Court further submitted a question of fact to the jury regarding counterplaintiffs Marshall Family Defendants, Bettye B. Marshall Trusts, and Dr. Stephen Cook as trustee of the Marshall Museum and Library Trust's counterclaim for declaratory judgment, and the jury found in favor of counterplainttiffs. Further, the Court finds that all decrees pertaining to VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH and as ordered herein do not arise from any conduct that occurred on or before March 8, 1999.

3.23. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that counter-defendant VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, did not have an agreement with J. HOWARD MARSHALL II that he would give her one-half of all his property;

3.24. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, abandoned any claim as to any property interest, other Interest, or claim of any kind or sort in the estate of J. HOWARD MARSHALL II, in the property or assets of the J. Howard Marshall, II, Living Trust, or in any property that is the subject matter of this proceeding, and that those persons designated in the Last Will and Testament of J. Howard Marshall, II, dated the 22nd day of December 1992 and admitted to Probate by this judgment, and in the Amended

and Restated Living Trust Indenture dated the 13th day of July 1994 shall take that property free of any claim by VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH;

3.25. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, has no claim against ROBERT S. MACINTYRE as the court-appointed temporary administrator of the Estate of J. HOWARD MARSHALL II, deceased, or against FINLEY HILLIARD as trustee of the J. Howard Marshall, II, Living Trust, based on any alleged promise by J. HOWARD MARSHALL II to give her any property or based on any other claim that VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, made or could have made in this proceeding;

3.26. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that any and all claims raised by the pleadings and evidence herein and asserted by the plaintiff VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, against defendant E. PIERCE MARSHALL, as an individual acting in his personal capacity; as trustee of the J. Howard Marshall, II, Lifting Trust; as agent or attorney-in-fact for J. Howard Marshall II; as trustee of the Marshall Museum and Library Trust; as co-trustee of the Marshall Grandchildren's Trust for the Benefit of E. Pierce Marshall Jr.; as co-trustee of the Marshall Grandchildren's Trust for the Benefit of Preston Marshall; as trustee of the Marshall Petroleum, Inc., Stock Holding Trust; as trustee of the Bettye B. Marshall Living Trust; as trustee of the J. Howard Marshall, II, Marital Trust Number Two; and as trustee of the E. Pierce Marshall Family Trust created under the Bettye B. Marshall Living Trust Indenture dated October 30, 1990, are hereby

DISMISSED based on her non-suit and abandonment of such claims;

3.27. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that any and all claims raised by the pleadings and evidence herein and asserted by the plaintiff VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, against the defendants MARSHALL PETROLEUM, INC; TROF, INC.; and MARSHALL OIL & GAS, L.L.C., are hereby DISMISSED based on her non-suit and abandonment of such claims;

3.28. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that any and all claims raised by the pleadings and the evidence herein and asserted by VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, against the defendant FINLEY HILLIARD as an individual acting in his personal capacity; as trustee of the J. Howard Marshall, II, Living Trust; as trustee of the Grantor Retained Annuity Trust; as trustee of the Charitable Remainder Annuity Trust; as trustee of the J. Howard Marshall Charitable Lead Trust; as trustee of the Marshall Petroleum, Inc., Stock Holding Trust; as trustee of the J. Howard Marshall, II, Liquidating Trust Number Two; and as trustee of the J. Howard Marshall, II, Family Trust are hereby DISMISSED based on her non-suit and abandonment of such claims;

3.29. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that any and all claims raised by the pleadings and the evidence herein and asserted by VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, against the defendants KEN FARRAR as trustee of the J. Howard Marshall, II, Living Trust; as trustee of the J. Howard Marshall, II, Liquidating Trust

Number One; and as trustee of the J. Howard Marshall, II, Family Trust are hereby DISMISSED based on her non-suit and abandonment of such claims;

3.30. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that, pursuant to a written settlement agreement, any and all claims asserted herein by VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, against the defendant EDWIN K. HUNTER are hereby DISMISSED WITH PREJUDICE;

3.31. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that any and all claims raised by the pleadings and the evidence herein and asserted by VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, against the defendant DR. STEPHEN COOK, sometimes improperly named as Dr. Steven Cook, as trustee of the Marshall Museum and Library Trust, are hereby DISMISSED based on her non-suit and abandonment of such claims;

3.32. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that any and all claims by any party raised by the pleadings and the evidence herein against the defendant ELAINE MARSHALL as co-trustee of the Marshall Grandchildren's Trust for the Benefit of E. Pierce Marshall Jr. and as co-trustee of the Marshall Grandchildren's Trust for the Benefit of Preston Marshall are hereby DISMISSED based on the abandonment of such claims by the failure to submit any question to the jury based thereon; and

3.33. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that any and all claims by any party raised by the pleadings and the evidence herein against the defendant ELEANOR STEVENS as successor

co-trustee of the Marshall Petroleum, Inc., Stock Holding Trust are hereby DISMISSED based on the abandonment of such claims by the failure to submit any question to the jury based thereon.

3.34. The Court finds that any and all claims by VICKIE LYNN MARSHALL against the Estate of J. HOWARD MARSHALL II or against the property in the J. Howard Marshall, II, Living Trust, including but not limited to claims that J. HOWARD MARSHALL II intended but failed to give her or to leave her any portion of such property during his life or upon his death, were required by law to have been asserted as compulsory counterclaims in this proceeding pursuant to TEX. R. CIV. P. 97. The Court further finds that the jury answered the foregoing questions that J. HOWARD MARSHALL II possessed mental capacity as required by law when he executed the Amended and Restated Living Trust indenture dated the 13th day of July 1994 and that the jury has failed to find that said execution was procured through undue influence exercised by E. PIERCE MARSHALL. The Court further finds that the jury answered the foregoing questions that J. HOWARD MARSHALL II possessed testamentary capacity as required by law when he executed the Last Will and Testament of J. Howard Marshall, II, dated the 22nd day of December 1992, and that the jury has failed to find that said execution was procured through undue influence exercised by E. PIERCE MARSHALL. The Court further finds that all defendants are also entitled to a take-nothing judgment based on any claim that VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, should have made in this proceeding as a compulsory counterclaim.

3.35. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court as a matter of law that VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, does not possess any interest in and is not entitled to possession of any property within the Estate of J. HOWARD MARSHALL II or any property of the J. Howard Marshall, II, Living Trust because of any representations, promises, or agreements made by J. HOWARD MARSHALL II to or with VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH;

3.36. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court as a matter of law that any and all claims that have been or should have been asserted by VICKIE LYNN MARSHALL A/K/A ANNA NICOLE SMITH, based upon alleged representations, promises, or agreements made by J. HOWARD MARSHALL II to or with VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, have been disposed of in this proceeding;

3.37. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that J. HOWARD MARSHALL II did not intend to give and did not give to VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, a gift or bequest from the Estate of J. HOWARD MARSHALL II or from the J. Howard Marshall, II, Living Trust either prior to or upon his death; and

3.38. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, shall take nothing from any claim that she should have made in this proceeding as a compulsory counterclaim against any of the following persons and/or legal entities:

1. E. Pierce Marshall;
2. Elaine Marshall;
3. E. Pierce Marshall Jr.
4. Preston Marshall;
5. Finley Hilliard;
6. Robert S. MacIntyre Jr. as the court-appointed temporary administrator of the Estate of J. Howard Marshall II;
7. E. Pierce Marshall as co-trustee of the Marshall Grandchildren's Trust for the Benefit of E. Pierce Marshall Jr.;
8. E. Pierce Marshall as co-trustee of the Marshall Grandchildren's Trust for the Benefit of Preston Marshall;
9. E. Pierce Marshall as Trustee of the Marshall Petroleum, Inc., Stock Holding Trust;
10. E. Pierce Marshall as trustee of the Marshall Museum and Library Trust;
11. E. Pierce Marshall as trustee of the Bettye B. Marshall Estate Trust;
12. E. Pierce Marshall as trustee of the J. Howard Marshall, II, Marital Trust Number Two;
13. E. Pierce Marshall as trustee of the E. Pierce Marshall Family Trust created under the Bettye B. Marshall Living Trust Indenture dated October 30, 1990;
14. Finley Hilliard, individually;
15. Finley Hilliard as trustee of the J. Howard Marshall II Living Trust;
16. Finley Hilliard as trustee of the Marshall Petroleum, Inc., Stock Holding Trust;

17. Finley Hilliard as trustee of the Grantor Retained Annuity Trust;

18. Finley Hilliard as trustee of the Charitable Remainder Annuity Trust;

19. Finley Hilliard as trustee of the J. Howard Marshall Charitable Lead Trust;

20. Finley Hilliard as trustee of the J. Howard Marshall II Liquidating Trust Number Two;

21. Finley Hilliard as trustee of the J. Howard Marshall II Family Trust;

22. Ken Farrar as trustee of the J. Howard Marshall, II, Living Trust;

23. Ken Farrar as trustee of the J. Howard Marshall, II, Liquidating Trust Number One;

24. Ken Farrar as trustee of the J. Howard Marshall, II Family Trust;

25. Elaine Marshall as co-trustee of the Marshall Grandchildren's Trust for the Benefit of E. Pierce Marshall, Jr.;

26. Elaine Marshall, as co-trustee of the Marshall Grandchildren's Trust for the Benefit of Preston Marshall;

27. Marshall Petroleum, Inc.;

28. Trof, Inc.;

29. Eleanor Stevens as successor co-trustee of the Marshall Petroleum, Inc., Stock Holding Trust; and

30. Dr. Stephen Cook, sometimes improperly named as Dr. Steven Cook, as trustee of the Marshall Museum and Library Trust.

3.39. The Court finds that, pursuant to the Uniform Declaratory Judgment Act, TEX. CIV. PRAC. & REM. CODE ANN. §§ 37.009 (Vernon 1987), E. PIERCE MARSHALL is entitled to an award of his reasonable and necessary attorneys' fees as is equitable and just against VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH. The attorneys' fees awarded herein against VICKIE LYNN MARSHALL A/K/A ANNA NICOLE SMITH are solely and exclusively based upon evidence relating to the attorneys' fees incurred during the trial which occurred in this cause between September 18, 2000 and February 18, 2001.

3.40. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that E. PIERCE MARSHALL have and recover from VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, attorneys' fees in the sum of FIVE HUNDRED FORTY-ONE AND NO/100 DOLLARS ($541,000.00) for services rendered through the trial of this cause. In the event of an appeal by VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, to the court of appeals, if such appeal is unsuccessful, E. PIERCE MARSHALL will be further entitled to recover ONE HUNDRED THOUSAND AND NO/100 DOLLARS ($100,000.00) from VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, as additional reasonable attorneys' fees. In the event of an appeal by VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, to the Supreme Court of Texas, if such appeal is unsuccessful, E. PIERCE MARSHALL will be further entitled to recover ONE HUNDRED THOUSAND AND NO/100 DOLLARS ($100,000.00) from VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, as additional reasonable attorneys' fees;

3.41. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the counterclaimant E. PIERCE MARSHALL as trustee of the Bettye B. Marshall Trusts have and recover actual damages and prejudgment interest from the counterdefendant J. HOWARD MARSHALL III in the sum of FOUR MILLION AND NO/100 DOLLARS ($4,000,000.00), plus prejudgment interest at the rate of 10% from December 14, 1998, until date of judgment and exemplary damages in the amount of SIX MILLION AND NO/100 DOLLARS (6,000,000.);

3.42. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that E. PIERCE MARSHALL have and recover from the ESTATE OF J. HOWARD MARSHALL II attorneys' fees in the sum of EIGHT HUNDRED THIRTY-THREE THOUSAND AND NO/100 DOLLARS ($833,000.00) for services rendered through the trial of this cause. In the event of an appeal by J. HOWARD MARSHALL III to the court of appeals, if such appeal is unsuccessful, E. PIERCE MARSHALL will be further entitled to recover FOUR HUNDRED THOUSAND AND NO/100 DOLLARS ($400,000.00) from the ESTATE OF J. HOWARD MARSHALL II as additional reasonable attorneys' fee. In the event of an appeal by J. HOWARD MARSHALL III to the Supreme Court of Texas, if such appeal is unsuccessful. E. PIERCE MARSHALL will be further entitled to recover EIGHTY-NINE THOUSAND AND NO/100 DOLLARS ($89,000.00) from the ESTATE OF J. HOWARD MARSHALL II as additional reasonable attorneys' fees;

4. MOTION FOR JUDGMENT NOTWITHSTANDING, THE VERDICT

4.1. The Court, having heard the Motion for Judgment Notwithstanding the Verdict filed by J. HOWARD MARSHALL III and having considered the evidence and argument of counsel, is of the opinion that such Motion should be GRANTED in part and DENIED in part,

4.2. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that:

4.2.1. the Motion for Judgment Notwithstanding the Verdict is GRANTED that E. PIERCE MARSHALL, ELAINE MARSHALL, E. PIERCE MARSHALL JR., PRESTON MARSHALL, and the Marshall Museum and Library Trust take nothing by reason of the jury's answers to Jury Questions No. 62, 63, 64, and 65, for the reason that, as a matter of Texas law, the filing of a will contest and/or the filing of a claim for an interest in an estate and/or the filing of a claim against an heir of an estate does not constitute tortious interference with inheritance rights.

4.2.2. the Motion for Judgment Notwithstanding the Verdict is DENIED as to the jury's answers to Questions No. 62, 63, 64, and 65 on the basis of no evidence or insufficient evidence, because the Court specifically finds that the Jury's answers to Questions No. 62, 63, 64, and 65 are fully supported by sufficient evidence;

4.2.3. the Motion for Judgment Notwithstanding the Verdict is DENIED that the MARSHALL MUSEUM AND LIBRARY TRUST and the BETTYE B. MARSHALL TRUSTS are not entitled to damages in accordance with the jury's answers to Jury Questions Nos. 67, 68, and 69,

and judgment will be granted in accordance with the jury's verdict. The Court specifically finds that the jury's answers to Questions No. 67, 68, and 69 are fully supported by sufficient evidence;

4.2.4. the Motion for Judgment Notwithstanding the Verdict is DENIED that the MARSHALL MUSEUM AND LIBRARY TRUST and the BETTYE B. MARSHALL TRUSTS are not entitled to punitive damages pursuant to the jury's answers to Jury Questions Nos. 71 and 72, and judgment will be granted in accordance with the jury's verdict;

4.2.5. the Motion for Judgment Notwithstanding the Verdict is GRANTED that E. PIERCE MARSHALL, FENLEY HILLIARD, and KEN FARRAR take nothing by virtue of their claims for attorneys' fees against HOWARD MARSHALL III, for the reason that there is no statutory basis for the recovery of Attorneys' fees as a matter of Texas Law; because J. HOWARD MARSHALL III, is not a party against whom attorneys' fees may be awarded in a will contest. The Court specifically finds that the jury's answers to Questions No. 58 and 60 are fully supported by sufficient evidence;

5. SANCTIONS MOTIONS

5.1. **BE IT FURTHER REMEMBERED** that on the 29th day of May 2001 and the 6th, 15th, and 18th days of June 2001 came on for hearing in due order and time the Defendants' motions for sanctions against Plaintiffs VICKIE LYNN MARSHALL and J. HOWARD MARSHALL III, respectively. Based on the contents of the file in the cause, the conduct of all counsel before and during the trial of the cause, all summary judgment filings and

evidence, the argument of counsel, the evidence adduced during the trial and the aforesaid hearings, and having been fully apprised of the premises, the Court here and now DENIES said motions.

5.2. The Court does not find that VICKIE LYNN MARSHALL and J. HOWARD MARSHALL III, acting in conjunction with and through their attorneys, violated TEX. R. CIV. P. 13, and TEX. CIV. PRAC. & REM. CODE ANN. §§ 10.001(1) and 10.001(3) (Vernon Supp. 2001) by the filing of pleadings in this cause. The Court further specifically finds that the pleadings of VICKIE LYNN MARSHALL and J. HOWARD MARSHALL III do not contain allegations or other factual contentions that are without evidentiary support.

5.3. The Court further does not find that any pleading or motion was presented by VICKIE LYNN MARSHALL and/or J. HOWARD MARSHALL III for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation.

5.4. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that Defendants' motions for sanctions against VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, and J. HOWARD MARSHALL, III, pursuant to TEX. R. CIV. P. 13 and TEX. CIV. PRAC. & REM. CODE ANN. § 10.004 (Vernon Supp. 2001), are DENIED;

6. RECONSIDERATION OF DISCOVERY SANCTIONS

6.1. BE IT FURTHER REMEMBERED that on the 6th day of June 2001 came on for hearing in due order and

time the Defendants' Motion to Set Aside Sanctions Against Them and Their Counsel and to impose Sanctions on Howard Jr. and His Counsel for Discovery Abuse; and, having heard the argument of counsel, having received the evidence, and having been fully apprised of the premises, the Court here and now GRANTS said motion in the following particulars.

6.2. The Court finds that Defendants objected to each and every one of the Master's Reports, but the *de novo* hearings to which the Defendants were entitled under Texas law were not held. The Court therefore declines to make final the interlocutory orders for sanctions and sets aside all such interlocutory orders.

6.3. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that all previous sanctions orders of the Court, including the Court's Orders of March 10, 1997; May 20, 1997; October 1997; October 21, 1997; December 4, 1997; June 9, 1998; August 28, 1998; September 28, 1998; October 5, 1998; October 12, 1998; and November 3, 1998, are not affirmed in this Final Judgment. Without limiting in any way the generality of the foregoing, the Court specifically holds that the Orders requiring Elizabeth Tipton and Rusty Hardin to pay sanctions upon the entry of final judgment in this case are not made final, and may not be enforced.

6.4. IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED by the Court that the sum of NINETY-FOUR THOUSAND NINE HUNDRED NINETEEN AND NO/100 DOLLARS ($94,919.00), paid by E. PIERCE MARSHALL in master's fees and expenses, are charged as court costs against plaintiff J. HOWARD MARSHALL III;

6.5. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the Orders requiring Elizabeth Tipton and Rusty Hardin to pay sanctions to JACK LAWTER and DIANE LAWTER upon the entry of final judgment in this case are SET ASIDE AND HELD FOR NAUGHT; and

6.6. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that J. HOWARD MARSHALL III pay ONE HUNDRED ONE THOUSAND THREE HUNDRED AND NO/100 DOLLARS ($101,300.00), the amount of attorneys' fees previously paid as sanctions to his attorneys Jack and Diane Lawter, to E. PIERCE MARSHALL as reimbursement of the sanctions previously paid by said defendant.

7.1. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED by the Court that the total amount of the judgment rendered will bear post-judgment interest at the rate of ten percent (10%) compounded annually from the date of judgement until paid; and

7.2. IT IS FURTHER ORDERED by the Court that all other costs of Court in this cause are adjudged jointly and severally against J. HOWARD MARSHALL III, plaintiff and counterdefendant, and VICKIE LYNN MARSHALL, A/K/A ANNA NICOLE SMITH, counterdefendant, for which let execution issue without further order of the Court if the same be not timely paid.

7.3. All writs and processes for the enforcement of and collection of this judgment or the costs of court will issue as necessary.

7.4. This Final Judgment finally disposes of all parties and all claims and is appealable.

SIGNED this 7th day of December, 2001.

/s/ Mike Wood
HONORABLE MIKE WOOD
JUDGE PRESIDING

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

In re **VICKIE LYNN MARSHALL,** **E. PIERCE MARSHALL,** **Plaintiff,** **v.** **VICKIE LYNN MARSHALL,** **Defendant.** **VICKIE LYNN MARSHALL,** **Counterclaimant,** **v.** **E. PIERCE MARSHALL,** **Counterdefendant.**	**CASE NO. SA CV 01-97 DOC** **(BANKRUPTCY CASE NO. LA 96-12510 SB; ADVERSARY CASE NO. AD 96-1838 SB)** **JUDGMENT** (Filed Mar. 7, 2002)

This action came before the Court for a de novo review of the proposed findings of fact and conclusions of law issued by the bankruptcy court after trial in this matter. Beginning on June 25, 2001, this Court conducted a de novo review of the bankruptcy court's proposed findings. From December 11, 2001 to January 8, 2002, this Court conducted an evidentiary hearing wherein it accepted the testimony of the central figures in the case, documentary evidence, and arguments of counsel. After reviewing all of the evidence in this matter and findings of fact and conclusions of law having been rendered,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered in favor of Vickie Lynn Marshall and against E. Pierce Marshall, as follows:

1. Vickie Lynn Marshall shall recover from E. Pierce Marshall compensatory damages in the amount of $44,292,767.33.

2. Vickie Lynn Marshall shall recover from E. Pierce Marshall punitive damages in the amount of $44,292,767.33.

3. Vickie Lynn Marshall shall recover costs of suit, to be taxed by the Clerk, in the amount of $___.

4. E. Pierce Marshall shall recover nothing against Vickie Lynn Marshall.

IT IS SO ORDERED.

DATED: MARCH 7, 2002

/s/ David O. Carter
DAVID O. CARTER
United States District
Judge

Nos. 02-56002, 02-56067

United States Court of Appeals
for the
Ninth Circuit

E. PIERCE MARSHALL,

Plaintiff, Counter-Defendant, Appellant,

-against-

VICKI LYNN MARSHALL,

Defendant, Counter-Claimant, Appellee.

APPEAL FROM THE FINAL DECISION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA IN NO. CV-01-00097 (HONORABLE DAVID O. CARTER, JUDGE)

SUBSTITUTED CORRECTED OPENING BRIEF OF APPELLANT E. PIERCE MARSHALL

(Filed August 11, 2003)

SANFORD SVETCOV
MILBERG WEISS
BERSHAD HYNES
& LERACH LLP
100 Pine Street,
Suite 2600
San Francisco, California
94111
(415) 288-4545

G. ERIC BRUNSTAD JR.
Counsel of Record
BINGHAM McCUTCHEN LLP
One State Street
Hartford, Connecticut 06103
(860) 240-2700

JOSEPH A. EISENBERG
JULIA J. RIDER
JEFFER, MANGELS, BUTLER
& MARMARO LLP
1900 Avenue of the Stars,
Seventh Floor
Los Angeles, California 90067
(310) 203-8080

Attorneys for Plaintiff, Counter-Defendant, Appellant E. Pierce Marshall

* * *

A. General Background

J. Howard married his first wife, Eleanor Pierce Marshall, in 1931. ER 3356. They had two sons, Pierce and J. Howard Marshall III ("Howard Jr."). ER 5216. J. Howard and Eleanor divorced in 1961. ER 3356.

That same year, J. Howard married his second wife, Bettye Bohannon Marshall. ER 3061. In 1986, Bettye was diagnosed with Alzheimer's disease. ER 5315. Bettye died in 1991. ER 3085.

In 1982, J. Howard met Jewell Dianne Walker ("Lady Walker") at a bar where she worked as a dancer. ER 3043. During the course of their relationship, J. Howard gave Lady Walker gifts of jewelry and other property worth millions of dollars. ER 3084, 3088-89. J. Howard established and funded a corporation for her benefit, known as Coliseum Oil and Gas, and transferred ownership of the corporation to her. ER 3514. At no time did J. Howard ever name Lady Walker as a beneficiary under his estate planning instruments. ER 131, 146, 225, 264, 289, 352, 3087. In addition, in spite of his affection for Lady Walker, J. Howard never gave her any interest in his principal assets. ER 3087. Instead, he provided for Lady Walker through the *inter vivos* gifts that he gave her during the course of their relationship. ER 3088-89. Lady Walker died in July of 1991. ER 5230.

Vickie and J. Howard met in Houston sometime in late 1991 at a club where she danced. ER 2419, 2420, 5410. The two were married in June of 1994. ER 95. At the

time of their marriage, she was twenty-six and he was eighty-nine. ER 95, 2420.

Both prior to and during their marriage, J. Howard gave Vickie substantial gifts worth over $6 million. ER 24-25, 2536-39, 2547-48. He bought several homes and automobiles for her use. ER 5534, 2548. He bought millions of dollars worth of jewelry for her use. ER 25. He promoted her career as a Playboy Playmate and international model. ER 4914, 4945. J. Howard paid for these gifts largely with borrowed funds. ER 5024, 5100.

Apart from these *inter vivos* gifts, J. Howard made no provision for Vickie in any of his estate planning instruments. ER 95, 1018. Nor did J. Howard ever give Vickie any interest in his business assets, including his stock holdings. ER 528, 644, 789, 819, 1017, 2378.

Both before and during the marriage, Vickie lived primarily in Los Angeles while J. Howard lived in Houston. ER 5137, 2490. Fourteen months after the marriage, on August 4, 1995, J. Howard died. ER 95.

B. J. Howard's Business Interests

In 1954, during his marriage to Eleanor, J. Howard helped establish the Great Northern Oil Company ("Great Northern"). ER 5210. J. Howard held a minority stake in this company. ER 5211.

Because J. Howard acquired his interest in Great Northern during his marriage to Eleanor, his interest was community property of that marriage. At the time J. Howard and Eleanor divorced in 1961, they divided their community property and placed their Great Northern stock into separate property trusts. ER 2622-23, 2672,

5217.[2] Although following the divorce Eleanor had her own Great Northern stock, she left control over her interests in J. Howard's hands. ER 5216-17.

Through a series of transactions between 1969 and 1972, the Koch family acquired a majority interest in Great Northern and consolidated the company into Koch Industries ("Koch"). ER 5212-13. As a result, J. Howard and his family became minority shareholders of Koch, holding approximately 8% of its stock. ER 5214.

In 1974, Koch declared a dividend of voting stock to existing shareholders. ER 5215-16. The shareholders' old stock became non-voting stock. ER 5215-16. Later in 1974, J. Howard and Eleanor gave all of their Koch voting stock in equal shares to their two sons, Pierce and Howard Jr. ER 5216, 5009. J. Howard and Eleanor retained their Koch non-voting stock in their separate trusts. ER 1457-58, 5212-5216.

During his marriage to Bettye, J. Howard and Bettye were meticulous about keeping their respective separate assets separate. ER 5220.[3] Although J. Howard and Bettye jointly invested their community property (i.e., the income from their separate property), at no time did J. Howard

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[2] During their marriage, and at the time of their divorce, J. Howard and Eleanor lived in California. California is a community property state. Cal. Fam. Code § 760 (West 1994). J. Howard moved to Texas in 1961. ER 3144.

[3] Under Texas law, the property that an individual owns prior to marriage, together with any appreciation in the value of that property, is the separate property of the individual and not community property. Tex. Fam. Code Ann. § 3.001 (Vernon 1998). In contrast, income from separate property that accrues during the marriage is considered community property. *Id.*, § 3.002; *see Colden v. Alexander*, 171 S.W.2d 328, 334 (Tex. 1943).

ever give Bettye any interest in his separate property, including his separate interest in his Koch stock. ER 5220.

Prior to 1980, the Koch family's majority stake in Koch was divided principally among four members of the Koch family. ER 3041. In that year, a dispute erupted within the Koch family over the management and direction of the company. ER 3072, 3073-74, 3129-30. Pierce and his father sided with those who wished to maintain the company's direction. ER 5344. Howard Jr. sided with those who wished to change the company's management philosophy. ER 3358-59, 5344.

To prevent Howard Jr. from voting his shares to oust the existing Koch board of directors, J. Howard purchased all of Howard Jr.'s stock from him for $8 million – a price that J. Howard viewed as exorbitant. ER 5218, 5345. In order pay for this purchase, J. Howard arranged to sell Howard Jr.'s shares back to Koch. ER 5219. As a result of this transaction, J. Howard and the members of the Koch family who wished to maintain the company's direction were able to do so. ER 3103-04.[4]

Following J. Howard's purchase of Howard Jr.'s Koch stock, J. Howard changed his estate plan to provide that Pierce and Bettye would be the principal beneficiaries of his estate. ER 131-146. J. Howard believed that Howard Jr. had betrayed him and that, in purchasing Howard Jr.'s stock for $8 million, J. Howard had been forced to overpay

[4] Subsequently, Koch bought back the shares of the dissident members of the Koch family. ER 5224. Since that time, Koch has remained a privately-held business. ER 3386-87. This buy-out had the effect of increasing the Marshall family's interest in Koch to 16%. ER 5213-14, 5224.

for the stock. ER 5218, 5345. Consequently, J. Howard excluded Howard Jr. from any distributions under his estate plan. ER 131, 146, 225, 264, 289, 352, 392, 510, 528, 5223.

In 1984, J. Howard, Eleanor, and Bettye formed a company called Marshall Petroleum, Inc. ("MPI"). ER 1455-56, 2623, 5222. J. Howard and Eleanor each contributed their Koch shares from their separate trusts to MPI in exchange for MPI stock. ER 164, 5222. At the time Bettye married J. Howard, she had her own Koch stock, which she retained in her own separate property trust. ER 5221. At MPI's formation, J. Howard's trust controlled approximately 55% of the company, Eleanor's trust controlled 42%, and Bettye's trust controlled 3%. ER 5222.

In 1989, Eleanor's trust sold some of her MPI stock back to MPI for cash. ER 3142. In 1991, upon Bettye's death, Bettye's interest in MPI passed to J. Howard. ER 5707-28. By 1992, J. Howard's trust controlled approximately 70% of MPI. ER 3494.

MPI's business activities included collecting and investing the dividends paid on the Koch stock that it owned, and managing the ownership and operation of various oil and gas properties. ER 3702-03. The MPI stock in J. Howard's trust was the principal source of his wealth. ER 3076-77. J. Howard served as an officer and director of MPI until shortly before his death. ER 4983.

C. J. Howard's Estate Planning

Beginning in 1982 – nine years before he met Vickie – J. Howard began keeping all of his assets, including his MPI stock, in a revocable form of trust known as a living

trust. ER 1018, 2623. From 1982 until his death, J. Howard executed a series of amended and restated instruments governing the terms of his living trust (the "Living Trust"). ER 131, 1453-55.

J. Howard's principal goal in setting up his Living Trust was to provide a mechanism for the distribution of his property upon his death. ER 5004-05. Each living trust instrument named the beneficiaries who would receive his property after he passed away. ER 131, 146, 225, 261-62, 264, 289, 352, 392 510, 528, 644. During his lifetime, J. Howard retained the beneficial interest in his Living Trust and thus received the income derived from the trust's assets (including income from the trust's shares of MPI stock). ER 146, 225, 528, 644, 789, 5268.

During his marriage to Bettye, J. Howard named Bettye and Pierce as the principal beneficiaries under his Living Trust. ER 146, 225, 289, 352, 5004-05. After Bettye's death, J. Howard designated Pierce as the principal beneficiary. ER 392, 528, 644.

During his lifetime, J. Howard stated repeatedly that he wanted Pierce to have his shares of MPI and, derivatively, the benefit of his interest in Koch. ER 3209, 5108-09.[5] Beginning long before his marriage to Vickie, J. Howard periodically gave Pierce gifts of MPI stock. ER 340, 605. Pierce also purchased shares of MPI and acquired them as compensation for services as an MPI

[5] As one of J. Howard's estate planning attorneys testified, "it is clear that he wanted his MPI shares to go to Pierce. Nothing M. Marshall ever did in his lifetime could be more clear than that." ER 3209. Correspondingly, as another one of J. Howard's estate planning lawyers testified, "there was never any intention to get [Vickie] any interest in Marshall Petroleum or Koch Industries." ER 4926.

officer. ER 5225. In addition to serving as a director of MPI, Pierce is a member of the board of directors of Koch and participates in running Koch. ER 1887.

On July 13, 1994, two weeks after J. Howard married Vickie, he executed his final amended and restated living trust instrument fixing the terms of his Living Trust. ER 3264-3268. In accordance with J. Howard's instructions, this instrument rendered the Living Trust irrevocable. ER 645-46, 1018, 3210. Although J. Howard made the Living Trust irrevocable, he nevertheless retained the power to make certain changes. ER 644.

First, he retained the power to add any charity as a beneficiary. ER 644, 3211. Second, he retained the power to substitute any beneficiary named in the trust for any other beneficiary. ER 644, 3194. As a result, until his death, J. Howard retained the right to exclude Pierce as a beneficiary, or to reduce Pierce's share, by increasing the share of any other beneficiary. ER 644, 5250. In addition, the Living Trust remained responsible for J. Howard's debts until his death. ER 644. As a result, J. Howard retained the ability to borrow against the assets in the Living Trust. ER 644.

In addition to the Living Trust, J. Howard left a series of wills. ER 131, 264, 510, 819, 4712. J. Howard's last will (the "Will"), like all of his previous wills after 1982, was a "pourover" will. This means that the Will left all of J. Howard's property not already in the Living Trust to the trust to be distributed after his death in accordance with the terms of the trust. ER 514-16. J. Howard executed his final Will on December 22, 1992. ER 510.

The Living Trust, rather than the Will, was the primary instrument that specified how J. Howard's property would be distributed upon his death. As a result, the Living Trust, rather than the Will, constituted J. Howard's principal estate planning instrument.

At no time did J. Howard ever make Vickie a beneficiary under his Will or Living Trust (other than with respect to certain real estate that he ultimately transferred to her out of the Living Trust shortly after their marriage); nor did he direct that she be added as a beneficiary. ER 95, 510, 647-51, 819, 1018, 2498, 2633. In addition, there are no drafts of either of these documents that name Vickie as a beneficiary.

Since Bettye's death, J. Howard specifically intended and provided that most of his property would be given to Pierce. ER 48, 528, 644, 649, 2967-68. Among other reasons, J. Howard trusted that, in handling the business affairs of MPI, participating in the management of Koch, and voting the Koch stock, Pierce would adhere to J. Howard's business philosophy for the continued growth and prosperity of Koch. ER 2267, 5004-06. J. Howard also wanted to keep MPI and the Koch stock intact as the "crown jewels" of the Marshall family, and trusted that Pierce would never sell these assets. ER 2267, 5004-06. In addition, J. Howard stated repeatedly that he intended to provide for Vickie with the gifts that he gave her during his lifetime. ER 2417-018, 2498, 2509, 2960-61, 3404-05.

J. Howard's second goal in setting up his estate plan was to minimize the taxes that would have to be paid upon his death. ER 2382. Throughout his adult life, J. Howard consistently pursued strategies to minimize the tax consequences of his transactions and any estate tax that

would have to be paid after he passed away. ER 2382. After J. Howard's death, the Internal Revenue Service ("IRS") scrutinized his income tax returns, his estate plan, and the various transactions underlying it. *See* 5469. Although J. Howard's estate is required to pay substantial taxes, the IRS did not find any of his estate planning transactions to be illegitimate, and the matter has been finally settled. ER 5469.

Because all of J. Howard's assets were held in the Living Trust, any purported gift to Vickie from J. Howard's assets (apart from the property that J. Howard actually gave her during his lifetime) would have had to come out of his Living Trust.

D. Events Prior to the Marriage

Soon after J. Howard met Vickie in 1991, he began giving her gifts. After Vickie's own car was repossessed, J. Howard purchased a new Toyota Celica for her use. ER 5157. He began giving her cash to pay her bills. ER 1303, 2405, 2934, 3586. He also began buying expensive jewelry for her use. ER 2934, 3585-3586. Over time, J. Howard purchased jewelry for Vickie's use costing in excess of $4 million. ER 3585-86, 3588.

On September 16, 1992, J. Howard purchased a ranch in Tomball, Texas for Vickie's use (the "Tomball Ranch"). ER 3409-10, 5170. Initially, he kept title to the ranch in the Living Trust. ER 5035, 5532. J. Howard also purchased a home for Vickie's use in Houston (the "Rustington House"). ER 3409-10, 3575. Title to the Rustington House was held in a land trust with Vickie and her minor son Daniel named as beneficiaries. ER 424.

Because Vickie spent a great deal of time in Los Angeles, J. Howard leased a home for her there. ER 3583-84. Later, he purchased a different home for her use there (the "Brentwood House"). ER 3587, 5171. In 1992 he purchased a new Mercedes for her use. ER 5160. J. Howard initially kept the title to the car in his own name. ER 3139.

In addition to these gifts, J. Howard promoted Vickie's career as a Playboy Playmate and international model. ER 5134-35. He bought her expensive clothing and gave her cash. ER 2933-34, 3576-77.

J. Howard paid for most of these gifts with borrowed funds. ER 3302, 5024. Although J. Howard received a salary from MPI and distributions from his Living Trust (which owned his MPI stock and received dividends from these shares), his gift-giving to Vickie far exceeded his income and J. Howard borrowed the money to pay for most of these gifts from MPI. ER 1309-10, 2401.

MPI had a revolving $15 million line of credit with Texas Commerce Bank. ER 2255, 5228.[6] MPI would borrow money periodically on this line of credit and would then lend the funds to J. Howard, who would use the money to buy gifts for Vickie. ER 3706-07, 5293. As a result, J. Howard became heavily indebted to MPI. ER 2256, 4963, 5293.

As J. Howard's gifts to Vickie increased, he consulted with one of his lawyers, Harvey Sorensen, about ways to

[6] This line of credit was secured by a pledge of the Koch stock that MPI owned. ER 5229. MPI's primary source of income was the dividends that it received on its Koch stock. ER 3076-77.

reduce his liability for gift taxes. ER 562-63, 4903-13. Previously, J. Howard had been required to file gift tax returns and pay substantial gift taxes for the gifts that he had given to Lady Walker. ER 5007-5019. These filings had sparked an audit by the IRS. *Id.* In his discussions with Sorensen, J. Howard explored a number of ideas regarding how to make gifts to Vickie while minimizing his taxes. ER 504-509, 562-63, 4905-15, 4925-26.

Sorensen was not J. Howard's only counsel. In addition, J. Howard consulted with his attorney Edwin Hunter over tax, gift, and estate planning matters. ER 4975-78, 5226. J. Howard first retained Hunter in 1988. ER 5226.

After meeting Vickie, J. Howard proposed that they be married. ER 5158-59. In anticipation of marriage, J. Howard asked Sorensen in late 1992 to draft a prenuptial agreement. ER 4892-4896. Sorensen prepared a draft, and presented it to J. Howard on November 18, 1992. ER 445-498, 4896, 5019. Under the terms of this draft, Vickie would have been entitled to receive $100,000.00 for each month of marriage, less the value of the gifts that J. Howard gave her during the marriage. ER 478, 480, 4902, 4897, 4902.[7] The agreement also provided that Vickie's entitlement would be reduced by half if she were unfaithful. ER 481.[8] J. Howard was apparently dissatisfied with the length of the draft, and asked Sorensen to revise it. ER 4896, 5020.

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[7] The agreement provided further that Vickie would be entitled to the benefit of $5 million placed in trust if she had a child with J. Howard, which did not occur. ER 478, 4897.

[8] Vickie was unfaithful. ER 2340-43.

J. Howard also gave a copy of the draft prenuptial agreement to Hunter and asked him to revise it. ER 5019-20. On December 14, 1992, J. Howard spoke with another one of his attorneys, Jeff Tonwnsend. ER 499. Thereafter, Townsend sent a letter to Hunter listing several ideas relating to Vickie: the prenuptial agreement; the creation of a "Marshall Farms" corporation; the creation of a corporation for Vickie's business; and a "catch-all" trust. ER 499.

Hunter revised the prenuptial agreement. ER 5020, 5025-33, 5636-43. Like the prior draft prepared by Sorensen, this revised agreement provided Vickie with a limited entitlement. ER 5021-25, 5638-40. Hunter worked independently of Sorensen on the revised prenuptial agreement. ER 5020, 5044-45.

Subsequently, J. Howard had the prenuptial agreement sent to Vickie's counsel for review. ER 2633. Vickie declined to sign the agreement. ER 2633.

Hunter also prepared documents for a "Marshall Farms" corporation. ER 5036-37. As indicated previously, J. Howard had purchased the Tomball Ranch for Vickie's use. ER 5035. The Living Trust, however, actually held title so that Vickie's creditors could not reach it. ER 5097-98. J. Howard inquired whether the expenses of running the ranch could be deducted for tax purposes. ER 4907-11, 5034-35. One possible way to accomplish this might be if the ranch were used to raise livestock. ER 5034-35.

In addition, Hunter prepared documents for a corporation for Vickie's modeling business, which ultimately became "Compagnie Victoire." ER 564, 5048. The purpose of this company was, in part, to permit J. Howard to make investments in Vickie's career. ER 2278, 3516, 5132-33.

Another purpose was to hold Vickie's business assets and other items that J. Howard gave her. ER 4914.

The last item listed on Townsend's letter, the "catch-all trust," was never pursued by J. Howard or any of his counsel. ER 5791-97, 5810-16, 5838-43.

On December 22, 1992, J. Howard met with Sorensen to execute his final Will and an amended and restated living trust instrument. ER 510, 528, 4942-43. Previously, on December 21, 1992, J. Howard met alone with Sorensen to discuss several items and ideas relating to Vickie. ER 2379-80, 4904-4909. Sorensen's agenda for the meeting included the Marshall Farms idea; a corporation to promote Vickie's modeling career (Compagnie Victoire); establishing a grantor retained income trust ("GRIT"); J. Howard's possible adoption of Vickie to reduce his tax liability; and the prenuptial agreement. ER 2378, 4905-09, 4913-17, 4922-23, 4887-90.

Sorensen advised J. Howard against adopting Vickie, and J. Howard dropped the idea. ER 2378, 4887-90. Sorensen also advised against the creation of the Marshall Farms corporation and the modeling corporation (Compagnie Victoire), and thought that J. Howard had accepted his advice. ER 1471-72, 4932-33. Ultimately, however, Hunter arranged to put these two corporations into place. ER 564, 571.

Although Sorensen listed the idea of the GRIT on his agenda as a possible tax planning device, J Howard rejected the concept. ER 5798-5803. Instead, J. Howard had a different idea about a transaction for Vickie – provided that it would not trigger any tax liability. ER 1467-8, 3172-73, 4878, 4924-26.

After his meeting with J. Howard, Sorensen dictated a memorandum regarding the meeting (the "New Community Memo"). ER 562, 1465-66. The New Community Memo indicates that J. Howard wanted Sorensen to explore the feasibility of a type of option for Vickie. ER 562, 3172-73. The value of the option would be based on a formula that took into account increases in the amount of dividends paid on the Koch stock and certain interest rates. ER 562, 4876-78, 5536-37. Under J. Howard's idea, Vickie would not be entitled to receive any payment on the option until fifteen years after the death of J. Howard's first wife, Eleanor. ER 562, 3171, 4926.

Sorensen and members of his firm researched J. Howard's option idea. ER 3172, 4876-79, 4927-28, 5536-37. Sorensen concluded that it was not feasible for tax reasons. ER 2383, 3171-72, 4927-28. In January of 1993, Sorensen advised J. Howard of the results of his research, and J. Howard instructed Sorensen to drop the matter. ER 3172, 4927-30. Significantly, if J. Howard had implemented this idea for Vickie, she would be entitled to little or nothing based on the formula set out in the memo. ER 5113-17, 5536-37.

Through the end of 1992, Hunter continued work on the creation of Compagnie Victoire, which was incorporated on December 30, 1992. ER 564, 578. Hunter's work included analysis of how the corporation would be structured and controlled. ER 580, 5038-43. J. Howard was concerned that Vickie did not know how to handle her assets or money. ER 5097-98. One idea was to place the shares of the corporation in trust for Vickie's benefit. Another idea was to create a voting trust governing how the corporation would be run. ER 4948-49.

After Compagnie Victoire was established, J. Howard anticipated that he would use it as the vehicle to make investments in Vickie's modeling career. ER 1463, 3090, 3704-05, 4914, 4945. J. Howard anticipated that it would be several years before Vickie's career reached its peak, and that the income from her career, backed by his investments made during his lifetime, would provide her with ample funds for her support. ER 5266, 5569, 2604.

E. 1993 Estate Planning Changes

In early 1993, Sorensen was working on a number of matters for the Marshall family, including the gift tax audit relating to J. Howard's gifts to Lady Walker. ER 3184-86, 4953-54. J. Howard had previously asked Pierce to be involved with this work. ER 1460, 3146-47, 4941. In February, J. Howard asked Pierce to instruct Sorensen to stop work temporarily on the gift tax audit pending further discussions. ER 3045-46. Pierce sent a letter to Sorensen accordingly. ER 579, 3045-46. Thereafter, Sorensen continued working for the Marshall family. ER 4934-35.

At this time, J. Howard turned to Hunter to make revisions to his estate plan. ER 540-602, 4975-78. J. Howard had three principal goals. ER 3058, 4984-85. First, he wanted to maximize his cash position to be able to continue making gifts to Vickie. ER 3058, 4985. Second, he wanted to minimize the tax liabilities to his estate. ER 3058, 4976, 4983. Third, he wanted to ensure that Pierce would be the primary beneficiary of his assets after he passed away. ER 4983-84. J. Howard asked Hunter to come up with ways to further these goals. ER 590-602, 4986-88.

During this time, J. Howard's accountant, Finley Hilliard, was pressing J. Howard to document and resolve his various loans from MPI. By this time, J. Howard had borrowed millions from MPI to fund his gift giving to Vickie. ER 3503-06, 3553-61, 5024, 5100, 5121-23, 5538, 5557, 5569-70. These loans appeared on MPI's books as "due from officer" accounts. ER 4958. J. Howard's failure to properly document and account for these loans had the potential of putting at risk MPI's status as an "S" corporation. ER 4958. J. Howard's failure to account for these loa was also unfair to other shareholders of MPI, principally Eleanor's trust, who were shouldering the burden of J. Howard's debt. ER 3091-92.

On August 25, 1993, J. Howard executed a series of transactions to clean up his loan balances with MPI and further his estate planning goals. First, in order to satisfy his debts to MPI, J. Howard sold 14,065 shares of his MPI stock back to MPI. ER 590, 603, 623, 634, 5059-60.[9]

Second, in order to maximize his cash position and further his goal of transferring his assets to Pierce, J. Howard sold 35,466 shares of MPI stock to Pierce for $17.5 million. ER 590, 616, 3318-19, 4995, 5059-62. As part of this transaction, Pierce executed a note to J. Howard that required Pierce to make periodic payments (the "Pierce Note"). ER 622, 3340, 5055-58, 5254-55.[10] Pierce has consistently made the payments called for under the note. ER 3134-35, 3223-25.

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[9] The stock that J. Howard sold to MPI in this transaction came out of the Living Trust.

[10] The stock that J. Howard sold to Pierce in this transaction also came out of the Living Trust. Pierce's payments under his note were made to the Living Trust.

Third, consistent with his prior practice of periodically giving shares of MPI stock to Pierce, J. Howard gave Pierce 2,044 shares of MPI stock. ER 605, 5054, 3317.[11] Under the terms of this gift, Pierce was responsible for paying any related gift tax. ER 605, 4998-99, 5054. In addition, J. Howard gave Pierce a second gift of 2,146 shares. ER 608.

Fourth, J. Howard transferred 47,288 shares of his MPI stock to a special trust known as a Grantor Retained Annuity Trust ("GRAT"). ER 611-614, 2625, 2635.[12] In this transaction, J. Howard exchanged shares of MPI for annuity payments from the GRAT. ER 611-614, 708, 846-48, 2624-26. This had the effect of establishing an income stream for J. Howard to fund his lifestyle. ER 3349. The transaction also had a potential tax benefit from an estate planning perspective. ER 2635, 5053.

Under the terms of the GRAT, the GRAT would hold the 47,288 shares of MPI stock for a term of five years while the GRAT paid for the shares by making annuity payments to J. Howard. ER 611-14, 2625. The tax benefit of this arrangement was to eliminate taxes on the ultimate transfer of the assets to the beneficiary of the GRAT because the GRAT would effectively pay for the assets over time. ER 2625, 5053. In the event J. Howard did not live for the five-year term of the GRAT, the GRAT would unwind and the shares would revert to J. Howard's Living Trust. ER 611-14. Although J. Howard anticipated in 1993

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[11] The stock that J. Howard gave to Pierce in this transaction came out of the Living Trust.

[12] The stock that J. Howard transferred to the GRAT also came out of the Living Trust.

that he would live for at least five more years, in fact he did not. ER 1098, 5062, 5804-09. The GRAT, however, paid dividends for the duration of its existence. ER 84-87, 5757-58.

Consistent with J. Howard's intent to keep all of his assets in the Living Trust, on January 13, 1994, J. Howard assigned his interest in the GRAT (i.e., his right to receive income from it) to the Living Trust. ER 2636, 3300-01, 3380. In March of 1994, following J. Howard's instructions, Hunter prepared an amendment to the GRAT following discovery of a technical error in the document. ER 4959-60. After Sorensen requested an explanation for the alteration, J. Howard executed an affidavit stating that the alteration had been made at his direction. ER 4960-61.

An important effect of the several transactions discussed above was to reduce J. Howard's ownership interest in MPI to 49.7%. ER 5252-53, 4982, 3383-84.[13] This was desirable for estate tax purposes, and was done at J. Howard's direction, because it reduced J. Howard's ownership interest in MPI to a minority position. ER 5252-53, 3382-84, 4982. For purposes of valuing a decedent's stock ownership for tax purposes, a majority position in a corporation typically carries a "control premium" – an increase in value to reflect the fact that the decedent controlled the corporation. ER 4981-82. Correspondingly, a minority position is typically entitled to a "minority discount" – a reduction in value to reflect the fact that the decedent did not control the corporation. ER 4981-82, 3383-84, 5252-53. By reducing his ownership interest to a

[13] As previously, J. Howard's MPI stock continued to be held in the Living Trust.

minority position, J. Howard effectively lowered the per-share value of his MPI stock for tax purposes, resulting in a tax savings. ER 4982-3, 5252-53, 3383-84. In order to fully relinquish his control, J. Howard also resigned as trustee of the voting trust that controlled MPI. ER 577, 2595-96, 5292.

F. Other Events Prior to the Marriage

Prior to their marriage, J. Howard and Vickie were often apart. ER 1462, 2604, 3394-95. Although she would call him frequently for money, she did not often visit him.[14] ER 2269-70, 2605. At times, J. Howard would fly to Los Angeles or New York to visit her. ER 2421, 2937, 2953, 2954.

During a trip to Los Angeles to visit Vickie prior to the marriage, Vickie claimed to have injured her leg and, during his visit, spent much of the time in bed wearing a cast. ER 2491-92, 2603-04, 2954. While J. Howard was taking a nap, however, his nurse, Betty Harding, came across Vickie in another room with the cast off and her arms and legs encircled in embrace around her housekeeper, giggling and rubbing noses. ER 2492-93, 2603-04, 2955. Later on during the visit, J. Howard went shopping with Harding to purchase jewelry for Vickie. ER 2493, 2957. When they returned with the jewelry, Vickie demanded to see the receipt and complained that J. Howard had not spent enough money on the purchase. ER 2493, 2957-58. J. Howard returned to the store to purchase more expensive jewelry. ER 2493-94, 2958.

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[14] Vickie referred to J. Howard as "Paw Paw." ER 3573, 3604. In public, she told others that he was her grandfather. ER 2603, 2931.

During a trip to New York, J. Howard waited in his hotel for several days only to have Vickie visit with him for thirty minutes. ER 2937, 3394-95. Just before he was scheduled to leave, Vickie asked that he meet her at an exclusive jewelry store, Harry Winston's. ER 2495-96, 3391, 3395-96. When J. Howard arrived at the store and met with Vickie, he was not interested in shopping. ER 3399. Vickie gave him a valium, leaving him incoherent and drooling in his wheelchair. ER 2495-96, 2943-44, 3392, 3397-00. She then had him buy her a 16-carat diamond engagement ring. ER 2753, 3400. On the return trip to Houston, J. Howard had heart palpitations, and Harding was concerned that, as a result of the valium, J. Howard might have died. ER 3391-2, 3402.

During the summer of 1994, members of J. Howard's staff learned that Vickie's "bodyguard," Pierre DeJean, had a record of multiple felony convictions. ER 681-90, 3426-27, 5318-22. Expressing their concern for J. Howard's safety, Eyvonne Scurlock (J. Howard's secretary) and Dan Hedges (one of J. Howard's attorneys) approached Pierce for authorization to arrange for surveillance of J. Howard. ER 3426-28, 5318-19. Pierce approved the request, and the surveillance was put in place. ER 3426-28, 5236-38.

Just prior to her marriage to J. Howard, Vickie "lost" much of the jewelry that J. Howard had given to her, including her engagement ring. ER 635, 2774-78. She filed a police report in Los Angeles, claiming the property had been stolen. ER 635. Contradicting her claim, she also asserted that she had given the jewelry to DeJean. ER 3592-94. Further contradicting her claim, she asserted

that she had left the jewelry in a bag in a cab. ER 3592-94. The jewelry has never been recovered. ER 2770, 3596.[15]

G. J. Howard's Additional Indebtedness to MPI

During 1993, J. Howard borrowed an additional $5.6 million from MPI, largely to fund his gift-giving to Vickie. ER 630, 633. Vickie thought of $50,000 as "pocket change." ER 2754. In order to obtain the money for Vickie, J. Howard would instruct Eyvonne Scurlock to borrow from MPI's line of credit. ER 1309-10, 2996-97. Scurlock would do so and then send the money to Vickie. ER 1303.

By the summer of 1994, Texas Commerce Bank was increasingly unwilling to permit the use of MPI's business line of credit to fund J. Howard's personal expenditures. ER 5306-07. By June of 1994, MPI had exhausted its entire line of credit, and had insufficient funds to pay its bills. ER 2256, 3078-79, 5295. At J. Howard's direction, Pierce and Finley Hilliard negotiated a $2.5 million extension of the line of credit, increasing the line from $15 million to $17.5 million. ER 3079, 5295-96. As a condition of this extension, Texas Commerce Bank required MPI to agree to reduce the outstanding balance on the line back to $15 million by January 30, 1995. ER 3097, 5297. The bank further required MPI to agree to reduce the line to $12 million by June 30, 1995. ER 3097, 5297.

As before, J. Howard was required to document his loans from MPI. ER 5611. To document outstanding

[15] The police did not believe Vickie's story, stating that "the report of lost jewelry is unfounded." ER 642.

indebtedness, J. Howard executed a note payable to MPI in the amount of $5,618,074 as of June 1, 1994 (the "June 1 Note"). ER 633. To assure payment of the $5.6 million note, J. Howard pledged the $17.5 million Pierce Note as collateral. ER 630. As a result, MPI was able to carry the $5.6 million loan on its books as a secured obligation, thus bolstering MPI's creditworthiness.

H. The Wedding

On June 27, 1994, J. Howard married Vickie at a ceremony in Houston. ER 5161. The wedding was attended by J. Howard's secretary, Scurlock, and one of his nurses, Charlotte Fade. ER 2990, 5161. Vickie's aunt and uncle also attended. ER 5161. Arnold Wyche, J. Howard's driver, brought J. Howard to the ceremony but did not attend. ER 2879, 5322. Pierce was not informed, and was unaware of the wedding, until July 11, 1994 when Dan Hedges told him that it had occurred. ER 2948-50, 5237-38.

The afternoon of the wedding, Vickie informed J. Howard that she had to leave that day for Greece for a photo session. ER 2801-02, 2976, 2983-84. Instead of travelling to Greece, however, Vickie flew back to Los Angeles. ER 2801-02, 2976, 2983-84.

I. J. Howard's Further Revisions to His Estate Plan

Shortly after the wedding, J. Howard called and met with Hunter to discuss certain "ante-nuptial" changes to his estate plan. ER 3248-50, 5064-65. J. Howard had three principal concerns that he wanted Hunter to address. First, he was concerned that, at some point during the marriage, he would become disabled. ER 2835, 3251, 3260-61.

J. Howard was worried that some of the people surrounding Vickie would attempt to gain control over his assets and interfere with his estate plan, ER 2835, 3251, 4965-66, 5065. J. Howard was aware that, if he were to become disabled, his wife would have priority to be named as his guardian. ER 2835-36, 5083. J. Howard wanted to structure matters so that Pierce would be in control of his estate, his estate plan would remain intact, and Vickie, or her advisers, would not gain control. ER 729-734, 4965-66, 5065, 5081-83. Previously, in 1992, J. Howard signed a document requesting that Pierce be appointed his guardian if a guardianship was ever warranted. ER 3189-90, 3259.

Second, J. Howard was concerned that Vickie was already receiving more than her share of any community property arising from their marriage. ER 3252-56, 5066. J. Howard continued to borrow money from MPI to fund his gifts to Vickie. ER 3252-56, 5569, 5610-11. He wanted to continue to provide for Vickie, and did not mind her receiving her share of any community property. ER 3253-54. At the same time, however, he did not want Vickie to be able to claim that, in addition to the funds he was giving her, she was entitled to more as her "community" interest. ER 3254, 5066. He was already borrowing for her benefit more than her share of the community, and he did not want her to be able to "double dip." ER 3254, 4964-66.[16]

[16] During the marriage, Vickie's "community property" share of J. Howard's income was approximately $1 million. ER 2539. In contrast, J. Howard borrowed many times this amount to fund his gift-giving to Vickie. Because she actually received far more than her share of any community property, Vickie has not made a community property claim.

Third, J. Howard wanted to confirm his estate plan. ER 2787-88, 2811-15. In particular, he wanted Pierce to "feel comfortable" that his marriage to Vickie was not changing his plan. ER 2811-2815, 2833-34, 2961-65, 3251-52, 3507-08, 3510, 4965, 5271-72. J. Howard intended to take care of Vickie through the support he was providing for her during his lifetime, and he wanted Pierce to remain as the primary beneficiary of his estate. ER 2959-60, 3088-99, 3291-96, 3390, 5265-67.

J. Howard instructed Hunter to implement his goals quickly. ER 3297-98. Returning to his office in Lake Charles, Louisiana, Hunter began preparing an outline of the relevant issues and how best to effectuate J. Howard's instructions (the "Fine Tuning Outline"). ER 5067, 5623-35. Hunter did not draft the outline in a single day. ER 5067. Instead, he created it over the course of many days as a working document that he updated and revised while working on revisions to J. Howard's estate plan. ER 5067.

Hunter did not share the Fine Tuning Outline with Pierce – or discuss J. Howard's plans with Pierce – because these involved J. Howard's affairs. ER 2294-95. Pierce did not actually see a copy of the Fine Tuning Outline until long after his father's death. ER 5248-49.

On July 12, 1994, Hunter met with J. Howard to present his ideas to implement J. Howard's instructions. ER 3262-67, 5239-40, 5241-46. Also in attendance at the meeting were two of his accountants Finley Hilliard and Nancy Koonce. ER 2633, 2669, 3264-65, 3538-39. They discussed making the Living Trust irrevocable. ER 3541-52, 5244. Hilliard explained the consequences of making the trust irrevocable, including that it would mean that Vickie would not be a beneficiary. ER 2669. J. Howard

understood and instructed that the trust be made irrevocable, stating that he would provide for Vickie in other ways. ER 2293, 2669, 5245-46.

J. Howard wanted to make the Living Trust irrevocable to protect his estate plan in the event he became disabled. ER 3250-51, 3265, 2596. J. Howard's concern was that, if he became disabled, a guardian might be able to revoke his estate plan if the trust were revocable. ER 3265. J. Howard also wanted to make his Living Trust irrevocable in order to prevent Vickie from claiming that the income that the trust earned, but did not distribute, was community property. ER 3253-56, 4964-66. By making the trust irrevocable, the income that the trust earned would not become community property, but could be used to pay his debts – only the funds that the trust actually distributed to J. Howard would become part of the community. ER 3256-58, 4965-66; *see Lemke v. Lemke*, 929 S.W.2d 662, 664 (Tex. App. 1996). J. Howard otherwise selected what he wanted done to his estate plan, and told Hunter to return the next day with documents for him to sign. ER 3267.

Hunter returned to his office and revised the Living Trust in accordance with J. Howard's instructions. ER 3267. At J. Howard's direction, Hunter also prepared a document granting Pierce power of attorney for J. Howard. ER 729-734, 2296, 2634-35 5081-83. Hunter, together with Hilliard, worked through the night to finish this work. They returned to meet with J. Howard on July 13, 1994. ER 3268-69.

J. Howard executed the revised Living Trust document, and Scurlock notarized his signature. ER 2589, 2669, 3269, 5073. J. Howard also executed the power of

attorney. ER 2634-35, 5081-83. Because Pierce was a co-trustee of the Living Trust (as he had been since 1982), Pierce also signed the Living Trust. ER 644-65. J. Howard was both the grantor and a trustee of the Living Trust. ER ER 5302. When J. Howard signed the Living Trust, he neglected to sign the separate acceptance of the oath of trustee. ER 3222, 5301. J. Howard subsequently signed the acceptance of the oath on July 15, and Scurlock notarized his signature. ER 3219, 5301.

At the time J. Howard executed his Living Trust, he was able to read. ER 2505, 2597, 3663. His daily routine included going to the office and reading the Wall Street Journal. ER 2597, 3647-48. J. Howard was fully competent and capable of understanding the transactions and documents that he was executing. ER 2410, 2633-34. J. Howard understood that he had made his Living Trust irrevocable. ER 2266, 2293, 2596, 2633-34, 2669.

After J. Howard executed the Living Trust, Jeff Townsend recorded it in Glasscock County, Texas. ER 5151-52. In addition, Townsend recorded the document in approximately 18 other counties, including Harris County (where J. Howard lived). ER 3639-40. Townsend recorded the document in the counties in which J. Howard had mineral and other interests in real property in order to give constructive notice of the Living Trust's ownership interests. ER 3639-40.

In 1994, J. Howard transferred to Vickie ownership of Compagnie Victoire by means of a transfer document that Vickie signed (the "Act of Donation"). ER 691-702. The Act of Donation stated that Compagnie Victoire owned the jewelry that J. Howard had purchased for Vickie's use, and copies of the jewelry receipts were attached. ER 691-702.

J. Howard also transferred title to the Tomball Ranch to Vickie, as well as title to the Mercedes that he had purchased for her use. ER 691-702.

J. Subsequent Events During the Marriage

In August of 1994, J. Howard flew to Los Angeles with his driver, Wyche, to visit Vickie for several days. ER 2888-96, 3598, 3649-52, 3653-62. During the visit, Vickie stayed in her room in her bed. ER 2888-97, 3649-52, 3653-62. When J. Howard suggested that he keep her company, she refused to allow him to lie next to her, stating that he would urinate in the bed. ER 2889, 3651. She remained in bed until J. Howard left. ER 2888-97, 3649-52, 3653-62. When he came to say goodbye, she asked him for money. ER 2894-95, 3660-62. He gave her his wallet and she took all of his cash, together with a blank check that she had him sign. ER 2895, 3660-62.

On another occasion, J. Howard asked Nurse Harding to take him to visit Vickie at the Tomball Ranch. ER 3414-15. At the ranch, Vickie asked Harding to leave J. Howard with her. ER 3415. Harding left, and drove to Scurlock's nearby home. ER 3415.

A short time later, Harding received a phone call from Vickie's aunt requesting that Harding come pick up J. Howard. ER 3415. Harding rushed back to the ranch. ER 3415. When she arrived, she found Vickie talking with her aunt in a car in the driveway. ER 3416. Harding found J. Howard in the house. ER 3416. His hair was standing up, his clothes were disheveled, and buttons were missing from his shirt. ER 3416-17. Although he would not tell Harding what happened, he made her promise that she would never again leave him alone with Vickie at her

house. ER 3417-18. He stated that his marriage to Vickie had been a mistake. ER 3418. He also stated that Vickie thought of him as a bottomless pit financially, which was not true. ER 3418. He stated that he wanted to teach Vickie how to handle her money, but all she wanted to do was spend. ER 3418.

At various times, Vickie pressed J. Howard to adopt her minor son, Daniel. ER 2614, 3429-30, 5721. J. Howard, however, never adopted Daniel. ER 2614, 3429-30. At one time, J. Howard sought advice as to whether he could conceive a child of his own with Vickie, but was informed that he could not. ER 5176-77.

In September of 1994, Vickie again took J. Howard jewelry shopping at Harry Winston's in Los Angeles. ER 5102-03, 3599. There, he wrote a check for approximately $1 million for jewelry purchases. ER 2658, 3599-3600, 5103. The bank, however, refused to honor it. ER 2275-76, 2297, 3517. Pierce received a call from J. Howard's bank, informing him that the bank would not honor the check. ER 2658, 2711. Pierce met with J. Howard and asked if J. Howard wanted to sell any assets to cover the check. ER 2335-36. J. Howard replied that he would not sell any assets and that the jewelry had to be sent back. ER 5103, 2616, 2658, 2711, 3518-20. J. Howard told Vickie to return the jewelry. ER 2275-76, 2316-34, 2616, 2711, 5103-04. Although Vickie told him that she would, she refused to do so. ER 2316-34, 2616, 5104-05. When Harry Winston's subsequently sued on the check, Pierce supervised the litigation. ER 1379.[17]

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[17] In settlement of certain subsequent litigation, Vickie agreed to return the jewelry and did so. ER 2316-18, 2329, 2616-17, 3601.

During Christmas of 1994, J. Howard again flew to Los Angeles with Wyche to visit Vickie. ER 3602, 3665-66. When he arrived at her house, Vickie was drunk and having a party with some friends. ER 3666. Soon after his arrival, she sent J. Howard to bed and continued on with her party. ER 3667.

On December 23, 1994, J. Howard gave Vickie a stuffed bear with an emerald pendant necklace. ER 3664-66. She served him breakfast. ER 3668-69. Because the bacon was raw, he avoided eating it. ER 3669-70. When she complained that he was not eating the food, he swallowed it. ER 3670. The raw bacon, however, made him sick. ER 3670.

That evening, Vickie insisted that J. Howard go out with her for dinner even though he did not feel well. ER 3671-72. While they were out, Vickie left J. Howard in his wheelchair in the rain. ER 2306, 3192-93. Afterwards she went dancing with her bodyguard, while Wyche stayed with J. Howard at the house. ER 3673-76.

On Christmas day, Vickie had Wyche take pictures of her and J. Howard. ER 3676-77. Although they posed together for pictures, she did not spend the day with him. ER 3677. Before J. Howard left, he gave her an envelope full of cash several inches thick. ER 3664-65, 3668, 3680.

After J. Howard returned to Houston, he became seriously ill and, in January of 1995, was hospitalized. ER 3413, 3420, 3681-82. Following his stay in the hospital, he returned to his home in Houston. ER 3683. J. Howard instructed his staff that, if his heart stopped or he stopped breathing, he did not want to be resuscitated. ER 3696,

3423-24. A sign to that effect was posted at his bedside. ER 3696.[18]

Vickie flew to Houston. ER 3684. While at J. Howard's house, she tried to feed him chicken soup. ER 2261. J. Howard had difficulty swallowing, and Vickie's feeding him the soup caused him to choke, and he lost consciousness. ER 2261-65. J. Howard's driver called 911, and eventually succeeded in reviving him. ER 2265.

During J. Howard's illness, Pierce and J. Howard's staff worried that J. Howard would die. ER 2271, 2807, 2971-72. J. Howard, however, recovered. ER 5762-63, 5228-30. In April of 1995, J. Howard was diagnosed with inoperable stomach cancer. ER 2946-47.[19]

K. Additional Estate Planning Transactions

From December of 1994 through May of 1995, J. Howard approved a final series of estate planning transactions. On December 28, 1994, following J. Howard's instructions, Pierce executed a document that renounced the right of J. Howard's estate to have the Living Trust pay the estate's debts (the "Act of Renunciation"). ER 703, 3067-68. The Act of Renunciation had no effect on J. Howard's ability to receive income from the Living Trust during his lifetime. ER 703, 3215. It only affected his

[18] During J. Howard's illness, Pierce removed him temporarily as a director of MPI due to his incapacity. ER 5750.

[19] The reason why the cancer was inoperable was because J. Howard had previously had gall bladder surgery and, at his age, his doctors did not wish to put him through another major surgery. ER 2918-20.

estate's right to recover from the Living Trust *after* J. Howard's death. ER 3215.

The signed Act of Renunciation was sent to Finley Hilliard, J. Howard's accountant. ER 5335. Hilliard subsequently executed his acknowledgement of receipt of the document on February 22, 1996. ER 5335.

On February 16, 1995, the trustees of the Living Trust agreed to change the situs of the Living Trust from Texas to Louisiana. ER 717. The actual transfer of assets occurred later. Subsequently, following litigation, the Louisiana Supreme Court concluded that Louisiana did not have jurisdiction over J. Howard's "succession" – meaning that Louisiana did not have jurisdiction over the distribution of his property. *See In re Howard Marshall Charitable Remainder Annuity Trust*, 709 So. 2d 662 (La. 1998).

On May 26, 1995, the Living Trust sold its remaining 63,051 shares of MPI stock to MPI in exchange for a private annuity. ER 768-71, 2636, 3278-84. For tax purposes, this transaction was a valid estate planning transaction provided that J. Howard's death was not "imminent." ER 3285, 3287-88. Under the then-prevailing legal standard, J. Howard's death was not imminent so long as the likelihood of his living for one year was 5% or greater, which it was. ER 3285-88, 5086-88; *Estate of Gordon B. McLendon v. Commissioner of Internal Revenue*, 135 F.3d 1017, 1022-23 n.7 (5th Cir. 1998). In addition, the GRAT sold its shares of MPI stock back to MPI in exchange for a note in the amount of $24,753,376 (the "MPI Note"). ER 3278-80.

One purpose for these transactions was to reduce J. Howard's estate taxes by freezing the value of MPI stock (which was appreciating). ER 3278-80. A second purpose

was to provide income for J. Howard. ER 2635-36, 5101. Although MPI could no longer borrow money to fund J. Howard's lifestyle, it might borrow funds to finance the buy-back of its stock. ER 5101-02. MPI has consistently made payments as required under the MPI Note. ER 5353.

In each of these transactions, the Living Trust received full consideration for the property that it transferred. ER 3374-76. J. Howard was provided with income to fund his lifestyle. ER 2635-36, 3279-81, 3284. In addition, his estate taxes were minimized. ER 2635-36, 3493. J. Howard furthered his longstanding goal of transferring his principal assets to Pierce. ER 3289-90, 3493. J. Howard was also able to provide millions in gifts to Vickie. ER 2406, 2636, 3492-93. Although J. Howard's gift-giving depleted his cash and left MPI in precarious financial straits, he avoided selling any of his principal assets. ER 3289-90. As a result, he was able to pass these assets along to Pierce, as he intended. ER 3289-90.

L. Guardianship Proceedings

On February 8, 1995, Pierce commenced guardianship proceedings for his father. ER 724-28. On February 16, 1995, the court appointed Pierce as temporary guardian of J. Howard's person. ER 742-45. On May 31, 1995, the court appointed Glenn Johnson as J. Howard's guardian *ad litem*. ER 788, 2254. In July, the court appointed Nurse Harding as his permanent guardian. ER 812-15. During the guardianship proceeding, J. Howard indicated that he wanted Pierce to remain as his guardian. ER 3440-41, 5143-46. During the guardianship proceeding, Pierce

continued to make payments to Vickie. ER 715, 719-22, 2300, 2316-20, 3080-81, 3524-25.[20]

On May 26, 1995, Vickie visited J. Howard at his Texas home, exposed her breasts, and asked him to repeat into a tape recorder that he intended to give her half of all of his assets. ER 760-761, 3698-3700, 5270-01. J. Howard refused. ER 5270-71. On August 4, 1995, J. Howard died of heart failure. ER 2661, 2807. He was ninety years old. ER 2808.

On the night before he died, J. Howard refused Vickie's phone call. ER 2809-10, 3434-35. During his marriage, J. Howard called Vickie daily, leaving messages for her to call him. ER 2605, 2795-96. She did not return his calls, contacting him only when she wanted money. ER 2399, 2605, 2795-96. During the last month of J. Howard's life, Vickie did not visit him in Houston. ER 2279, 3693. Although J. Howard clearly loved Vickie, he ultimately called her "unteachable." ER 3436. As Nurse Harding described J. Howard's experience with Vickie, "his year of being married to her was just a total long, lonely, frustrating, miserable existence." ER 2501.

During J. Howard's last days, Scurlock visited him and asked if he wanted to speak with counsel to make any changes to his estate plan. ER 3710-12. J. Howard said that he did not. ER 3710-12. As J. Howard repeatedly indicated since 1982, he wanted Pierce to have his principal assets. ER 3082, 3510, 2787-89. As he intended, J. Howard attempted to provide for Vickie through the gifts

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[20] Subsequently, when Vickie sued for a determination of the validity of the Living Trust (discussed below), J. Howard instructed Pierce to stop making payments to her.

that he actually gave her while he was alive. ER 2961-65, 2584, 3088-89, 5265-67, 5271-72.

At no time did Pierce interfere with his father's intentions. ER 2303-04, 2605, 4882-86, 4912-13, 5045, 5148-49, 5084-85. Even when Pierce disagreed with his father, Pierce carried out his instructions. ER 2337, 2605, 4882-86. As Vickie herself testified, J. Howard was always fully competent. ER 3569.

M. Vickie's Initiation of Proceedings in Texas

In April of 1995, several months prior to J. Howard's death, Vickie commenced proceedings in the Texas Probate Court against Pierce and others seeking a declaration regarding the validity of the Living Trust. ER 5620. Vickie alleged that Pierce had tortiously interfered with her property rights with respect to J. Howard's assets. ER 5615-17.

Three days after J. Howard died, Vickie filed a further application in the Probate Court to determine that J. Howard died without a will. ER 816-18. Pierce opposed Vickie's application and sought to admit his father's Will into probate. ER 836-45. Vickie thereafter contested the Will in the Probate Court. ER 5523-31.

Subsequently, Vickie amended her probate complaint to add a claim against Pierce, asserting that Pierce tortiously interfered with J. Howard's alleged intent to give her a gift from his assets. ER 2862-65. In filing her claim in the Probate Court, Vickie conceded the jurisdiction of the Probate Court over her claim. ER 2842.

Vickie was not the only person who contested J. Howard's estate plan in the Texas Probate Court. ER 857-70. Apart from Vickie, other parties also challenged J. Howard's written scheme for the distribution of his property, alleging various claims and rights. ER 857-70. These parties included Pierce's brother, Howard Jr., and various institutional claimants. ER 857-70, 1028-48, 2044-52.

The theories of the parties challenging the validity of the Living Trust clearly conflicted with the terms of the Living Trust. Vickie contended that she was entitled to one half of J. Howard's property. ER 2762-63, 3609-10. Howard Jr. claimed that he was entitled to a substantial share. ER 857-70. Certain institutional claimants contended that J. Howard had promised them large gifts. ER 1028-48, 2044-52. In contrast, the express provisions of the Living Trust gave most of J. Howard's assets to Pierce. ER 289-336.

Obviously, J. Howard could not have intended that virtually all of his assets should go to Pierce and yet, at the same time, virtually all of the same assets should go to others. As a result, the Probate Court was required to sort out which claims were valid and which were not in order to settle J. Howard's estate and quiet title to his assets.

N. The Probate Trial

Trial of the various claims and controversies involving J. Howard's estate plan and his intentions regarding the distribution of his assets began in the Texas Probate Court on September 18, 2000. ER 4706. The trial lasted for over five months, ending on March 1, 2001. *Id.* The Probate Court heard the testimony of over forty witnesses and received hundreds of items of evidence. ER 4066-71, 4706-27.

Just prior to trial, Vickie identified the causes of action against Pierce that she proposed to submit to the jury. ER 4073. These included her claim of tortious interference with a gift, as well as allegations of fraud, duress, and undue influence. ER 4076-78, 4086-90, 4102.

On October 2, 2000, Vickie's lead trial counsel, Tom Cunningham, delivered Vickie's opening argument. ER 4068, 4106. Among other things, he stated that "[t]his case is about tortious interference with an *inter vivos* gift." ER 4068, 4134. Vickie's counsel stated that Vickie would testify that J. Howard promised her "half of everything that he had." ER 4068, 4121.

In discussing the evidence that he intended to present, Vickie's counsel referred to the same "evidence" that Vickie would later rely on in pursuing her claim against Pierce in federal court: (a) Townsend's letter of December 15, 1992 mentioning a "catch-all trust"; (b) Sorensen's New Community Memo of December 23, 1992 discussing J. Howard's option idea; (c) the alleged firing of Sorensen as J. Howard's principal estate planning lawyer; (d) the estate planning transactions that took place in 1993; (e) Hunter's Fine Tuning Outline regarding estate plan changes that J. Howard wanted to make after his marriage to Vickie; (f) the execution of the Living Trust and power of attorney on July 13, 1994; and (g) the 1995 estate planning transactions. ER 4124-27, 4138, 4147, 4164-66.

As part of Vickie's case, she called seven witnesses, including Hunter. ER 4069-70. Vickie called three additional witnesses in rebuttal. ER 4070.

The Probate Court kept a running record of trial time consumed by the parties. ER 4070, 4173-75. The log revealed that Vickie's counsel spent 3590 minutes in the

examination of witnesses. ER 4070-71. This includes a total of 1031 minutes spent questioning Pierce. ER 4070. Vickie's counsel also questioned at least fourteen other witnesses, including Sorensen, Hunter, Koonce, Hilliard, Wyche, Townsend, Leticia Hunt (one of J. Howard's nurses), and Scurlock. ER 4070. All of the five witnesses that the District Court heard in its subsequent review of Vickie's claim (Hunter, Pierce, Sorensen, Vickie, and Townsend) testified in the Probate Court. ER 8, 4070-71, 4173-75.

Vickie identified Donald J. Fandry as an expert witness in her case. ER 3149-64.Vickie engaged Fandry to analyze whether the Living Trust was a forgery or had been altered. ER 3322-23. Fandry, however, did not testify at trial because he was not qualified as an expert witness. ER 3322-38. As a result, his proposed testimony was never subjected to cross-examination.

Howard Jr. identified J.L. Hale, Jr., as an expert witness in support of his case. ER 3322. Howard Jr. also engaged Hale to analyze whether the Living Trust was a forgery. ER 3322-24. Hale was only permitted to testify about the staple hole patterns in the document. ER 5767-90. He was not permitted to testify regarding other issues because, like Fandry, he did not qualify as an expert witness. ER 3322-38. Accordingly, other than with respect to the staple holes, his proposed testimony was not subject to cross-examination.

Pierce identified Jeanette Hunt as an expert in support of his defense. ER 3163. Hunt testified that J. Howard's signature on the Living Trust was genuine. ER 3002-03, 3004-05.

Vickie testified for approximately six days. ER 4071. She testified extensively regarding her alleged expectancy of a gift or inheritance, including her allegation that J. Howard promised to give her half of his assets. ER 4071. No other witness substantiated her testimony. ER 1304, 3606-10. Similarly, Vickie produced no documentary evidence of the alleged promise. ER 3611-12. Further, Vickie's testimony conflicted with other public statements that she had made that J. Howard did not intend to give her any such gift. ER 3634-35.

During trial, Vickie's conduct was so disruptive, and her testimony so obviously fabricated, that, at one point, the presiding judge directed her to stop making up stories and to "stop lying." ER 3613-14.

As part of the probate proceedings, Vickie accused Pierce of discovery abuse. ER 2516, 4725-27. In its final judgment, however, the Probate Court dismissed Vickie's allegations of discovery abuse as unfounded and unproven. *Id.*

O. The Probate Jury's Verdict

On March 7, 2001, the Texas jury returned its verdict upholding the validity of J. Howard's Living Trust and Will and rejecting the various claims seeking recoveries at odds with J. Howard's estate plan. ER 3719, 3735. In rendering its verdict, the Texas jury rejected all of the various allegations that the Living Trust and Will did not reflect J. Howard's true intentions. These included the allegation that the Living Trust had been forged or altered, that J. Howard had been the victim of fraud or undue influence, that Pierce had interfered with J. Howard's intent, and that J. Howard lacked the requisite

mental capacity when he executed his Will and Living Trust. ER 3718, 3720, 3736, 3761, 3773, 3782. The jury also specifically rejected Vickie's claim that J. Howard has promised her half of his assets. ER 3782.

P. The Probate Court's Judgment

On August 15, 2001, the Probate Court entered its final judgment, disposing of all claims and issues related to J. Howard's intended disposition of his property, including Vickie's claim. ER 4001. Subsequently, on December 7, 2001, the Probate Court entered its second amended final judgment (the "Probate Judgment"). ER 4706.

In entering its judgment, the Probate Court admitted J. Howard's Will to probate, finding the Will to be genuine and valid and not the product of improper conduct. ER 4714, 4715. The court also found the Living Trust to be genuine and valid and not the product of improper conduct. ER 4717.

With respect to Vickie, the court concluded that it had "exclusive" jurisdiction under Texas law over her claim and rights, including any claim regarding "the making *of any inter vivos or* testamentary gift or transfer by [J. Howard] of any of his property." ER 4712. The Probate Court further determined that any and all claims by Vickie regarding J. Howard and his property, "including but not limited to claims that [J. Howard] intended but failed to give her or to leave her any portion of such property during his life or upon his death, were required by law to have been asserted as compulsory counterclaims in this proceeding." ER 4720-21.

On the merits of Vickie's claim, the Probate Court specifically ruled that "[J. Howard] did not intend to give and did not give to [Vickie] a gift or bequest from the Estate of [J. Howard] or from the [Living Trust] either prior to or upon his death. . . ." ER 4721. The court further ruled "that [Vickie] does not possess any interest in and is not entitled to possession of any property within the Estate of [J. Howard] or any property [of the Living Trust] because of any representations, promises, or agreements. . . ." ER 4721.

The Probate Court also held that

(a) all of Vickie's claims were resolved and dismissed, ER 4719, 4721;

(b) Vickie was entitled to "take nothing" from Pierce, ER 4721; and

(c) Pierce was entitled to his inheritance free and clear of any claim by Vickie. ER 4718.

All of the foregoing matters were fully litigated in the probate case, including the Probate Court's jurisdictional determination and its conclusion that Vickie's claim was required to be brought in the probate proceeding. ER 4712, 4721, 2522-25, 2683-87.

Q. Vickie's Bankruptcy Case

During the pendency of the probate proceeding, Vickie's housekeeper obtained a sexual harassment judgment against her in the amount of $850,000.00. ER 2642. Allegedly unable to pay this judgment, on January 25, 1996 Vickie filed a voluntary chapter 11 bankruptcy case in Los Angeles. ER 2642.

At the time of J. Howard's death in 1995, Vickie had several homes and hundreds of thousands of dollars in her various bank accounts. ER 30 n.16. By the time of her bankruptcy filing six months later, she listed less than $7,000.00 in her bank account. ER 881.

After Vickie commenced her bankruptcy case, the United States Trustee joined in a motion requesting that a trustee be appointed to take control of Vickie's property owing to Vickie's inability to comply with bankruptcy procedures and manage her affairs. ER 871-914. The Bankruptcy Court refused to appoint a trustee. ER 933-35. Instead, the court appointed an examiner, who issued a report. ER 934-35, 963-87.

In her report, the examiner chronicled Vickie's inability to keep track of her finances and property. ER 971-80. The examiner also reported Vickie's reduced ability to work due to her propensity to abuse alcohol and drugs. ER 978, 983, 2413.

R. Vickie's Pursuit of Her Tortious Interference Claim Against Pierce in the Bankruptcy Court and Her Emergence from Bankruptcy

On June 14, 1996, Vickie asserted a claim against Pierce in the Bankruptcy Court alleging, among other things, that Pierce tortiously interfered with her expectancy of an inheritance or gift from J. Howard. ER 948-49. This claim is virtually identical to the tortious interference claim that Vickie filed in the Probate Court. *Compare* ER 948-49 *with* ER 2863-65.

Vickie filed her claim in the Bankruptcy Court as a "counterclaim" to a complaint that Pierce filed seeking a determination that a particular debt that Vickie might

owe to him would be nondischargeable in her bankruptcy case. ER 936. Specifically, in a separate proceeding in Texas, Pierce had sued Vickie and two of her attorneys for defamation. ER 5729. After Vickie filed her bankruptcy case, Pierce dismissed her from the suit without prejudice. ER 5740-42, 5743. One of the attorneys settled prior to trial of the defamation action. The other attorney tried the matter to a jury and lost. Specifically, the jury rendered an $8.5 million verdict against the attorney finding that the attorney published statements about Pierce that were slanderous and libelous, were not true, and were made with actual malice. Pierce subsequently settled the matter with the attorney.

With regard to Vickie, Pierce filed a complaint in the Bankruptcy Court seeking a determination that, in the event Vickie were found to be liable to Pierce for defamation, her liability would not be dischargeable in her bankruptcy proceeding. ER 922-32. In filing his complaint, Pierce did not request the Bankruptcy Court to determine whether Vickie was, in fact, liable for defamation. *Id.* Pierce simply asked the Bankruptcy Court to determine whether any liability that she might have would be nondischargeable (meaning that it would survive her bankruptcy). *Id.* Pierce also filed a proof of claim attaching the nondischargeability complaint. ER 5.

The Bankruptcy Court granted Vickie's motion for summary judgment on Pierce's nondischargeability complaint. ER 2756. Instead of resolving the narrow bankruptcy question of nondischargeability, the court summarily determined that Vickie had no liability for any defamatory conduct. ER 2757. After this ruling, the only claim remaining before the Bankruptcy Court was Vickie's tortious interference claim against Pierce. ER 2756.

On July 8, 1996, Pierce moved to dismiss Vickie's tortious interference claim for lack of subject matter jurisdiction. ER 957. On August 14, 1996, the Bankruptcy Court denied Pierce's motion. ER 3366.

On January 6, 1997, Pierce moved the Bankruptcy Court to abstain from considering Vickie's tortious interference claim. ER 1049-69. On January 29, 1997, the Bankruptcy Court denied Pierce's abstention motion. ER 3371.

On March 8, 1999 – while Vickie's claim for tortious interference remained pending – Vickie confirmed her chapter 11 plan of reorganization. ER 2200. Pursuant to the Bankruptcy Court's confirmation order, Vickie emerged from bankruptcy with a discharge of her preexisting debts. ER 2201. Specifically, the confirmation order provided that Vickie was discharged from her debts arising prior to the date of the confirmation of her plan. ER 2200-04.

S. The Bankruptcy Court's "Trial" and Judgment

After Vickie obtained her bankruptcy discharge, she continued to prosecute her tortious interference claim against Pierce in *both* the Texas Probate Court and the Bankruptcy Court in California. As a result, Pierce was forced to litigate the same claim at the same time in two separate proceedings.

In contrast to the Probate Court's five-month jury trial, the Bankruptcy Court conducted a five-day hearing on Vickie's tortious interference claim commencing on October 27, 1999. *Compare* ER 2642 *with* ER 4706. At the outset of the hearing, the Bankruptcy Court conducted a

press conference at which the court invited members of the press to ask questions in open court. ER 49-53. A reporter for Newsweek responded by taking the podium to ask questions. ER 2393-95, 5751-56. The Bankruptcy Court answered the questions and discussed the relationship between the bankruptcy proceedings and the then – pending proceedings in the probate court. ER 2393-95, 5751-56.

During the five days of hearings, the Bankruptcy Court essentially refused to permit Pierce to call his witnesses and put on his case by severely circumscribing the testimony and the presentation of evidence. ER 2173-75, 2641-49. Instead of permitting Pierce to try the issues, the court deemed that Vickie had established her expectancy, and likewise deemed that Pierce had interfered with it, precluding testimony and evidence contrary to the court's findings. ER 2173, 3049, 3052-53. As discussed more fully below, the court deemed these findings to exist as an unjustified discovery sanction against Pierce. ER 3052-53.

Nearly a year later, on September 27, 2000 – the eve of jury selection in the probate case – the Bankruptcy Court issued a decision concluding that Vickie had an expectancy of an *inheritance* based on her "widow's election" against J. Howard's estate, and that Pierce had interfered with her expectancy. ER 3032. The Bankruptcy Court awarded Vickie damages in the amount of $449,754,134. ER 3038.

A few days later, on October 6, 2000, the Bankruptcy Court *sua sponte* entered a revised opinion (the "Amended Opinion"). ER 3047. Abandoning the "widow's election" concept, the court deemed in its Amended Opinion that

Vickie had an expectancy of a *gift* from J. Howard, stating that Vickie "had an expectancy to receive a substantial portion of [J. Howard's] wealth." ER 3053.

Concluding on the basis of presumed facts that Pierce interfered with this expectancy of a gift, the Bankruptcy Court awarded Vickie damages in the amount of $449,754,134 – an amount identical to the court's earlier award under its different "widow's election" theory. ER 3049 n.5, 3055. The court calculated this award in part on its view of the increase in the price of oil. ER 3049 n.7. This method of calculation has no known relevance to the proceedings, as J. Howard did not receive any significant portion of his income from the production of oil, and there was no evidence that any increase in the price of oil generated any income to J. Howard.

On November 21, 2000, the Bankruptcy Court assessed punitive damages against Pierce in the amount of $25 million. ER 3243. On December 29, 2000, the Bankruptcy Court entered a judgment in Vickie's favor in the total amount of approximately $474 million (the "$474 Million Judgment"). ER 3360.

T. The Basis for the Bankruptcy Court's Judgment

The Bankruptcy Court based its $474 Million Judgment on presumed facts that it created as a "sanction" for Pierce's alleged discovery abuse, which allegations are unfounded and untrue. ER 3049 n.5, 3050-52. As a consequence of the alleged "abuse," the court issued sanctions orders that effectively resolved Vickie's claim in her favor.

The Bankruptcy Court entered its initial sanctions order on February 2, 1999 (the "Initial Sanctions Order").

ER 2172. Pursuant to this order, the court deemed various matters to be established for purposes of determining Vickie's claim against Pierce, including that J. Howard had intended to leave Vickie a substantial inheritance and that Pierce had tortiously interfered with her inheritance rights. ER 2173.

On appeal, the District Court vacated the Bankruptcy Court's sanctions order as without evidentiary support, and remanded. ER 2211, 5744-49. On May 20, 1999, the Bankruptcy Court simply reimposed its sanctions order in a form virtually identical to the order that the District Court had previously vacated (the only difference being the addition of footnotes) (the "Final Sanctions Order"). ER 2240. As a result of this sanctions order, Pierce was not permitted to put on his case in the Bankruptcy Court or to challenge any of the court's presumed findings. ER 2240.[21]

On January 18, 2000, well after the Bankruptcy Court concluded its five-day hearing at which Pierce was barred from presenting his case or challenging any of the presumed findings, the Bankruptcy Court *sua sponte* withdrew its Final Sanctions Order. ER 2927 Nevertheless, in entering its Amended Opinion and its $474 Million Judgment against Pierce, the Bankruptcy Court adhered to its presumed findings and specifically based its opinion on these presumed findings. ER 2646.

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[21] Both sanctions orders were drafted by Vickie's counsel. ER 2175, 2240.

U. The Alleged Basis for the Sanctions

In establishing the existence of Pierce's alleged discovery abuse, the Bankruptcy Court never conducted an evidentiary hearing. Nor did any witness ever testify as to the alleged abuses. Instead, following a series of status conferences, the court accepted as true the unsubstantiated and contested accusations of Vickie's counsel. The Bankruptcy Court based its sanctions on several categories of alleged discovery abuses.

1. Alleged Document Destruction

In its Amended Opinion, the Bankruptcy Court stated that "Pierce destroyed a substantial quantity of documents that were subject to a pending discovery request." ER 2644. The record, however, refutes this finding.

The only evidence of the destruction of any documents is Pierce's testimony in the probate proceeding. As a board member of Koch, Pierce routinely received confidential board materials from Koch, which he routinely destroyed in the ordinary course. ER 1024-27, 4061 Pierce's actual testimony was that the documents that he destroyed were copies (not originals) of certain minutes of Koch board meetings, board meeting agenda, and confidential board information. *Id.* Pierce also testified unequivocally that he did not destroy any communications with his father, memoranda prepared by his father, letters written by his father, or any communications with his father's attorneys. ER 1024-25. In addition, Pierce reconstructed the copies of the board materials that he destroyed and produced them. ER 2016, 4061.

There is no evidence that any of these documents were the subject of any pending discovery request in the bankruptcy case, or that they were in any way relevant to Vickie's claim.[22] In addition, the documents were readily available from other sources, including Koch itself.

In spite of the evidence and Pierce's testimony, Vickie relentlessly and falsely accused Pierce of being a destroyer of pertinent documents. *See*, *e.g.*, ER 1960 (stating the "Pierce admitted destruction of his father's personal correspondence"), ER 1842-43, (claiming that "[t]he Black Hole of documents that chronologically follow the expressed intention of Debtor's husband to provide for her remain 'missing,' withheld or destroyed.").

2. Alleged Failure to Serve Discovery Responses

In its Amended Opinion, the Bankruptcy Court also found that Pierce "failed to serve a written response within 30 days after the service of the request," and that Pierce did not serve any response "within any reasonable time thereafter." ER 2644. Again, the record refutes the court's finding.

On February 27, 1998, Vickie served on Pierce her first set of interrogatories. ER 1684. These included 340

[22] The only request propounded by Vickie relating to any Koch documents that the Bankruptcy Court required Pierce to respond to was her request number 85, which demanded "[a]ny and all documents which embody, refer or relate to communications since January 1990 between Plaintiff and any agent, or employee of Koch Industries, on the subject of Debtor, J. Howard Marshall, III, the J.H. Marshall, II Living Trust, or the purported succession of J.H. Marshall, II." ER 1010-11. None of the Koch documents that Pierce discarded were responsive to this request.

separate requests. ER 1684. Pierce's counsel contacted Vickie's counsel to discuss the overbreadth of the requests. ER 1532. On April 1, 1998, the parties conferred telephonically regarding Vickie's discovery. ER 1532. During the call, Vickie's counsel refused to withdraw any of the requests. ER 1532.

Pierce then undertook to answer the 340 interrogatory requests. ER 1532. His subsequent review and investigation took the better of two months to complete. ER 1532. On April 29, 1998, when Pierce's review and responses were nearly complete, Vickie's counsel sent a letter withdrawing all 340 interrogatory requests. ER 1532.

On November 8, 1996, Vickie propounded her first request for production of documents making 91 requests. ER 962, 987-1012. These requests were duplicative of documents that Vickie had already obtained through discovery in the probate proceeding. On November 20, 1996, at a meeting of counsel, Pierce produced over 300 pages of documents, including J. Howard's Will. ER 1264, 1274-75.

On December 12, 1996, Pierce filed his response objecting to many of Vickie's requests. ER 987. Because Vickie's requests were served by mail (which permits three additional days to respond), Pierce's response was one day late. *See* Fed. R. Bankr. P. 9006(f). In response to Pierce's objections to some of her requests, Vickie brought a motion to compel. ER 1082.

The Bankruptcy Court held a status conference on February 26, 1997. Even though Pierce had previously produced over 300 documents, Vickie stated falsely that "not one scrap of paper [has] been served on [Vickie] since they [sic]

day they were supposed to respond on the document production" and that the only thing that had been produced was a "pile of newspaper clippings." ER 1079-80.

On March 12, 1997, the court held a hearing on Pierce's objections to Vickie's production requests, together with Vickie's motion to compel. ER 1263. The Court significantly modified and narrowed many of Vickie's overbroad requests. ER 1265-71. Recognizing that Vickie had prevailed in part and that Pierce had prevailed in part, the court stated that "an award of sanctions [had] to recognize that neither side won an undivided victory on [the] motion." ER 1272-73, 1275-76. Nevertheless, the court imposed sanctions of $5,000 on Pierce, and none on Vickie. ER 1278.

On March 24, 1997, the Bankruptcy Court issued an order setting forth the categories of documents that Pierce was required to produce. ER 1280. In April 1997, Pierce produced 25 boxes of documents in compliance with the Court's order. ER 1389.

On February 27, 1998, Vickie served her second request for production of documents, comprising 115 additional requests. ER 1642. These were repetitive of her first 91 requests. ER 962, 987-1012. Counsel for Pierce and Vickie agreed that Pierce could have until May 6, 1998 to respond. ER 1708. On May 1, 1998, Pierce served his response. ER 1475.

On July 30, 1999, Vickie served her third request for production of documents. ER 2444. Nearly all of these requests were for privileged documents. ER 2444. Pierce served his response on September 2, 1999. ER 2444.

3. Alleged Failure to Produce Privilege Log and Documents for *In Camera* Review

In its Amended Opinion, the Bankruptcy Court found that Pierce failed to properly produce a privilege log, and failed to produce documents for *in camera* inspection. ER 2644. The record demonstrates that this is also untrue.

Pierce produced his first privilege log on May 2, 1997, in response to Vickie's first request for production of documents. ER 1291. In November of 1997, Pierce located additional documents and supplemented his privilege log. ER 1421. Vickie did not complain of any insufficiency in Pierce's log until February of 1998 when she moved to strike Pierce's answer. ER 1341. On June 15, 1998, Pierce amended his privilege log. ER 1730, 1772-81. On November 20, 1998, in response to the court's request, Pierce provided a revised privilege log. ER 2059, 2066-2119. The revised privilege log set forth the date, author, recipient, claimed privilege, ownership of privilege, and subject of each privileged document. ER 2066.

On May 5, 1998, the court ordered Pierce to produce his privileged documents for *in camera* review. ER 1723-26. On July 2, 1998 Pierce produced all of his privileged documents to the court. ER 1826-27.

4. The Hunter Documents

In its Amended Opinion, the Bankruptcy Court found that Pierce committed discovery abuse because he failed to produce documents in the possession of Edwin Hunter, J. Howard's estate planning lawyer. ER 2645. The record demonstrates that Pierce made every effort to have these documents produced and that they were, in fact, ultimately produced. Moreover, the record demonstrates that

the reason why these documents were not produced initially was because Vickie failed to comply with applicable procedures to obtain them, and made false statements to the Bankruptcy Court regarding her efforts to do so.

The Bankruptcy Court's order of March 24, 1997 directed Pierce to produce documents in Hunter's possession, including papers that had belonged to J. Howard. ER 1906. Pierce asked Hunter to produce these documents. ER 1901-02. Hunter asserted that he could not produce the documents voluntarily for two reasons. First, Hunter did not represent Pierce and the documents in question belonged to persons other than Pierce, including J. Howard's documents, which belonged to his estate. ER 1900, 1903. Second, many of the documents were covered by the attorney-client privilege held by someone other than Pierce, including Robert MacIntyre, the administrator of J. Howard's estate. ER 1900-03.

On January 19, 1998, Vickie served Hunter with a subpoena *duces tecum* issued from the United States Bankruptcy Court for the Eastern District of Texas. ER 1895. Hunter lived and worked in Louisiana, and the subpoena was improper. On February 2, 1998, Hunter objected to the subpoena. ER 1896. Nevertheless, at Pierce's request, Hunter voluntarily produced over 65,000 pages of documents and provided a privilege log. ER 1896.

On February 17, 1998, Vickie filed a motion to strike Pierce's answer to her complaint, alleging failure to comply with discovery. ER 1341.

On March 10, 1998, the Bankruptcy Court held a brief impromptu discovery conference. ER 1436. At the hearing, Vickie falsely stated through counsel that she was not receiving any documents from Hunter. ER 1438-39, 5736-39.

In fact, at the time that Vickie's counsel in California was complaining to the Bankruptcy Court that Hunter had not produced anything, Vickie's other counsel in Texas was reviewing and marking documents for copying from Hunter's production. ER 1530-31.

At the March 10 conference, Pierce agreed to assist Vickie in obtaining non-privileged documents from third parties, including Hunter. ER 1441-48, 1530. Pierce contacted Hunter and asked that he provide the documents that she requested. ER 1442-43, 1530-31.

On May 5, 1998, the Bankruptcy Court held a further hearing on Vickie's motion to strike Pierce's answer and impose discovery sanctions. ER 1716. During the hearing, Vickie argued that she should not have to comply with applicable procedures to compel production from Hunter. ER 1719-22. Vickie also complained about Hunter's privilege log. ER 1721-22. Even though Pierce had no control over Hunter or his privilege log, the court ordered Pierce to have Hunter annotate his privilege log more completely and to produce the privileged documents for *in camera* inspection. ER 1723-26.

After the hearing, Pierce contacted Hunter and asked him to cooperate. ER 1897. Hunter directed that his privilege log be annotated. ER 1897. Hunter also prepared 26 boxes of privileged documents for shipping to the Court for *in camera* review. ER 1901. Hunter became concerned, however, that he could be viewed as breaching his professional obligations to his clients who had not waived their privileges if he sent documents without a court order. ER 1901. Hunter attempted to obtain permission for release of the documents, but failed. *Id.* As a result, Hunter informed Pierce that he could not comply with the production of

privileged documents absent a court order. *Id.* Pierce asked Hunter to reconsider. *Id.*

On July 1, 1998, Hunter sought a protective order from the Bankruptcy Court in Beaumont, Texas clarifying his obligations. ER 1898. The Beaumont court concluded, however, that it lacked jurisdiction because Vickie never filed a motion to compel compliance with the subpoena. *Id.*

On August 27, 1998, the Bankruptcy Court held a further hearing. ER 2007. At the hearing, Vickie urged the court to sanction Pierce for Hunter's failure to produce documents. ER 2012-15. The court inquired of Vickie's counsel about the status of the Beaumont subpoena. ER 2009-11.

In response, Vickie's counsel stated falsely that he had made a motion to compel in the Beaumont court, which was pending. ER 2011. In fact, no such motion was ever made. ER 2784. The court stated: "I think that [Vickie] should proceed with respect to the subpoena issued by the . . . Beaumont court for any documents that Mr. Hunter has not produced and that's the forum where that should be litigated." ER 2017.

On October 29, 1998, the Bankruptcy Court held another hearing. ER 2053. Again, Vickie's counsel falsely stated: "I don't have to hang around Beaumont to know I'm not going to get anything there, but we're going to take every step we can take." ER 2056. In fact, Vickie took no further steps in Beaumont.

In March of 1999, Robert MacIntyre, the administrator of J. Howard's estate, agreed to waive the estate's privilege and Hunter produced 200 boxes of documents for Vickie's review. ER 2216, 2232.

5. Townsend Documents and Privilege Determinations

In addition to Hunter, Vickie sought the production of documents in the possession of Townsend, another of J. Howard's attorneys. ER 1348. In its Amended Opinion, the Bankruptcy Court found that Pierce should be sanctioned because Hunter and Townsend did not properly assert any claim of privilege. ER 2646. The record demonstrates that Pierce had no control over any assertion of privilege by Hunter or Townsend or the production of documents in their possession. Moreover, the Bankruptcy Court never afforded Pierce any opportunity to defend any claim of privilege.

Although Vickie never served Townsend with a subpoena, Townsend agreed to produce the documents in his possession, other than privileged materials. Vickie's counsel reviewed these documents on April 22 and 23, 1998. ER 1531. On July 2, 1998, Pierce produced additional Townsend documents. ER 1826-28. Like Hunter, Townsend initially declined to produce various documents because they did not belong to Pierce, and MacIntyre, the administrator of J. Howard's estate, would not waive the estate's privilege. ER 1731, 1814. As with Hunter, Vickie did not seek to compel Townsend to produce any documents.

On October 29, 1998, the Bankruptcy Court ordered Pierce to produce the privileged Townsend documents for *in camera* inspection, stating that if he failed to do so at the next hearing his counsel should "bring a toothbrush." ER 2054-55. On or before November 24, 1998, Pierce produced to the court the privileged Townsend documents. ER 2147. The court then advised counsel that there would

be no opportunity to argue whether a particular document was privileged, stating "the opportunity to be heard has passed." ER 2150. In fact, neither Pierce nor any other party was ever afforded an opportunity to be heard on the question of privilege.

On January 12, 1999, without opportunity for argument, the Bankruptcy Court, after its own review, turned over to Vickie all documents that the Court deemed were not subject to a valid claim of privilege. ER 2155-57. The court then sanctioned Pierce's counsel $5,000 for Townsend's allegedly claiming a privilege in bad faith. ER 2159. Pierce's counsel, however, had no authority or opportunity to review the Townsend documents prior to their submission to the court or to make any claim of privilege. ER 2161. Nonetheless, the court imposed the sanction stating: "It doesn't matter." ER 2162.

On January 22, 1999, the Bankruptcy Court sanctioned Pierce's counsel $15,000 without notice for allegedly dumping the Townsend documents on the court for *in camera* review without properly reviewing them ahead of time. ER 2163. In fact, Pierce's counsel was not responsible for the production and had no opportunity or authority to review these documents. ER 2160.

V. Withdrawal of the Reference and Initial District Court Proceedings

In September of 1998, Pierce moved to withdraw the litigation from the Bankruptcy Court to the District Court. ER 2019. On October 19, 1998, the District Court (Keller, J.) withdrew the matter, but left the Bankruptcy Court free to resolve *pending* discovery disputes. ER 2038-39, 2043. At the hearing, the District Court remarked: "As I

view this case overall, . . . essentially we are talking about a probate lawsuit here. Okay? And this should be resolved . . . in the Probate Court in Texas." ER 2036-37.

On January 12, 1999, the Bankruptcy Court indicated that it intended to submit a secret memorandum to the District Judge "to assist in his review of the matter." ER 2158. The District Court subsequently acknowledged on the record receiving the Bankruptcy Court's secret memorandum. ER 2207-08. The contents of this memorandum have never been disclosed.

On February 1, 1999, the District Court stayed the Bankruptcy Court's previous sanctions orders. In defiance of the District Court's stay, however, the Bankruptcy Court declared on February 2, 1999 that the District Court's order was ineffective. ER 2172, 2178, 2186-88. The Bankruptcy Court then entered its Initial Sanctions Order deeming various matters to be established for purposes of determining Vickie's tortious interference claim against Pierce. ER 2172.

On March 9, 1998, the District Court vacated the Initial Sanctions Order. ER 2209, 2211. At the hearing, the District Court remarked: "This is being over litigated and being litigated in the wrong forum. This is first and foremost a Texas probate case." ER 2206.

The District Court then vacated its prior withdrawal of the litigation, sending the matter back to the Bankruptcy Court. ER 2211. On May 20, 1999, the Bankruptcy Court reimposed its vacated sanctions order against Pierce by entering its Final Sanctions Order deeming Vickie's allegations against Pierce to be established for purposes of Vickie's tortious interference claim. ER 2235, 2240. Thereafter, as set forth above, the Bankruptcy Court entered its

$474 million judgment against Pierce based on presumed findings of fact.

W. Vickie's Unsuccessful Attempt to Withdraw from the Probate Case

After the Bankruptcy Court issued its $474 Million Judgment against Pierce on Vickie's claim, Vickie attempted unsuccessfully to withdraw from the ongoing Texas probate proceeding. ER 4713. On January 5, 2001, she filed a "nonsuit" of her tortious interference claim against Pierce in the Texas case. ER 4713.[23] Vickie also moved to dismiss the various counterclaims that Pierce had filed against her in the Texas proceeding, and, on January 17, 2001, the probate judge denied Vickie's motion to dismiss. ER 3446, 3472.

On February 9, 2001, Pierce, with leave of court, filed amended counterclaims against Vickie in the Probate Court, including a request for declaratory relief to determine Vickie's rights in J. Howard's property and estate. ER 2196-97, 3620. In entering its judgment (as set forth in greater detail above), the Probate Court rejected Vickie's claim that J. Howard intended to give her a gift, and ruled in Pierce's favor on his declaratory judgment claim seeking a determination of Vickie's claims. ER 4713, 4721-23.

X. The Bankruptcy Court's Injunctions

After the Bankruptcy Court entered the $474 Million Judgment, Vickie requested and obtained a series of

[23] A "nonsuit" is the equivalent of a voluntary dismissal of a claim. *Compare* Tex. R. Civ. P. 162, 163 *with* Fed. R. Civ. P. 41(a).

injunctions from the Bankruptcy Court enjoining ongoing proceedings in the Probate Court concerning Vickie. ER 3807-16. Subsequently, the Probate Court entered an injunction of its own prohibiting Vickie from enforcing the Bankruptcy Court's injunctions. ER 3922. On August 13, 2001, the District Court reversed the Bankruptcy Court's injunctions. ER 3989.

As part of its Probate Judgment resolving all controversies over J. Howard's assets and estate plan, the Probate Court awarded Pierce approximately $541,000 in attorneys' fees against Vickie based exclusively on events occurring during the probate trial after Vickie obtained her bankruptcy discharge. ER 4723. Following the entry of this award, Vickie sought relief in the Bankruptcy Court to enjoin enforcement of the Probate Court's award of attorneys' fees. ER 4032. On February 26, 2002, the Bankruptcy Court ruled that the Probate Court's award of attorney's fees violated Vickie's bankruptcy discharge. ER 5369. On appeal, the District Court affirmed. ER 5500. Pierce's appeal of the District Court's affirmance is presently pending in this Court. *See In re Vickie Lynn Marshall,* case no. 02-56603.

Y. The District Court's Reversal of the Bankruptcy Court's $474 Million Judgment, and its Ruling on Subject Matter Jurisdiction and the Probate Exception

On June 20, 2001, the District Court (Carter, J.) vacated the Bankruptcy Court's $474 Million Judgment, citing the Bankruptcy Court's lack of plenary jurisdiction to enter a final order resolving Vickie's tortious interference

claim. ER 120-21, *see also* 3821-3921.[24] At the same time, the District Court refused to dismiss Vickie's claim, concluding that it had plenary bankruptcy jurisdiction to determine her claim *de novo,* and that the Probate Exception to federal court jurisdiction did not apply. ER 109-10, 120-21.

Z. The District Court's Resolution of Pierce's Motion to Dismiss on Grounds of Claim Preclusion and Issue Preclusion

Following the Texas Probate Court's entry of the Probate Judgment, Pierce filed a motion in the District Court to dismiss Vickie's tortious interference claim on grounds of claim preclusion and issue preclusion. ER 83, 86. On December 11, 2001, the District Court heard argument on Pierce's motion. ER 4762-815. On the same day, the District Court also commenced its *de novo* hearing on Vickie's tortious interference claim. ER 4, 8, 4815. On December 21, 2001, the court denied Pierce's motion. ER 82, 93.

AA. Discovery in the District Court

Prior to conducting its *de novo* review of Vickie's claim, the District Court ordered Pierce to deposit with the court all of his documents and files relating to the case, including all privileged files of his counsel. ER 4063. Subsequently, the court directed Pierce to bring these

[24] Although Judge Keller had previously been assigned the matter in the District Court, Pierce's appeal of the Bankruptcy Court's judgment was assigned to Judge Carter, who presided over all subsequent hearings in the District Court.

materials to a designated warehouse location. *Id.* In response, Pierce prepared hundreds of boxes of materials. *Id.*

On the date Pierce delivered the materials, the presiding District Judge appeared at the warehouse and, over Pierce's objection, summarily handed over all of Pierce's documents to Vickie's counsel, including all counsel files. *Id.* In doing so, the court deemed Pierce to have waived any privilege. ER 4064.

BB. The District Court's Hearing and Judgment

In preparation for the District Court's *de novo* hearing on Vickie's claim, Pierce submitted a list of percipient witnesses that he planned to call, together with a summary of their testimony. ER 4671-83. Vickie submitted a list of witnesses jointly with Pierce's submission. ER 4667-70.

The District Court initially indicated [sic] the witnesses that it would hear, which did not include many of Pierce's percipient witnesses. ER 4024, 4671-83. At the commencement of the hearing, Pierce summarized the testimony of his percipient witnesses that he requested the court to hear. ER 4671-83, 4839-73.

During the proceeding, after the District Court heard from several witnesses, the court inquired whether Vickie desired to call any of the other witnesses on her list, running through her list name by name, which additional witnesses Vickie stated she did not wish to call. ER 5274-79. The court also ran through the list of percipient witnesses that Pierce requested, stating its understanding that Pierce wished to call additional witnesses, and also

stating that the court did not intend to hear these witnesses. ER 5280-87. At other times during the proceeding, the District Court stated that it understood that Pierce was requesting the opportunity to put on the live testimony of additional percipient witnesses, but that the court was not inclined to permit Pierce that opportunity. ER 5092, 5106, 5147, 5256-57.

Pierce's proposed percipient witnesses who testified in the probate proceeding, but whom the District Court refused to hear, included:

(a) Finley Hilliard, J. Howard's accountant of many years, who would have testified regarding J. Howard's intentions and that, among other things, it was J. Howard's decision to make the Living Trust irrevocable without provision for Vickie and that J. Howard was fully aware of what he was doing and the consequences of his action, ER 4678-79, 3971-73;

(b) Nancy Koonce, another accountant, who was present when J. Howard made the decision to make the Living Trust irrevocable without provision for Vickie and would have testified that this was J. Howard's decision, ER 4678-79, 3974;

(c) Betty Morgan Harding, J. Howard's long-time nurse and confidant, who would have testified about J. Howard's condition, his intentions, and Vickie's mistreatment of J. Howard, ER 3982-85, 4679;

(d) Eyvonne Scurlock, J. Howard's secretary of many years, who would have testified about J. Howard's intentions and that J. Howard executed the Living Trust as his own free act and deed, ER 3963, 4678;

(e) Arnold Wyche, J. Howard's driver, who would have testified about the relationship between Vickie and J. Howard, ER 3975-76, 4680-81; and

(f) Leticia Hunt, one of J. Howard's nurses in his final months, who would have testified about events in J. Howard's and Vickie's relationship and J. Howard's intentions toward Vickie, ER 3981, 4681.

As the District Court indicated, issues of credibility were critical to its deliberations. ER 5091. Yet, instead of hearing the live testimony of these and other percipient witnesses on key facts, the court indicated that it would rely on its review of secondary materials, such as deposition transcripts, and the probate proceeding. ER 5259. Pierce explained that the deposition transcripts were particularly inappropriate as a substitute for live testimony because, among other reasons, the transcripts did not reflect testimony elicited upon Pierce's questioning. *Id.* Over Pierce's objection, the District Court also curtailed Pierce's examination of Vickie, particularly concerning contradictory statements she made regarding her expectancy of a gift. ER 5190-91, 5193-95.

On January 8, 2002, the District Court heard argument on Pierce's contention that Texas does not recognize a cause of action for tortious interference with an expectancy of a gift. ER 5364-67. Pierce filed a brief on this issue in the District Court on January 8, 2002. ER 5355. Pierce also argued to the District Court at other times that Texas law does not recognize a cause of action for tortious interference with an expectancy of a gift. ER 4797.

On March 7, 2002, the District Court entered its judgment against Pierce, awarding Vickie $88,585,534.66

in compensatory and punitive damages. ER 5385. At the same time, the District Court denied Pierce's motion to reconsider its prior ruling on claim preclusion and issue preclusion. ER 5387.

In rendering its judgment, the District Court predicted that the Texas Supreme Court would recognize a cause of action for tortious interference with an expectancy of a gift. ER 69-70. Applying this theory, the court determined that J. Howard intended to give Vickie a large gift of some kind, and that "he wanted Vickie to have the benefit of the gift after he had passed away." ER 34.

The court further concluded that Pierce tortiously interfered with J. Howard's intentions by engaging in illegitimate "estate planning transactions for J. Howard." *Id.* at 73. Among other things, the court determined that Pierce had altered the Living Trust and that it was a forgery, ER 65 – a contention rejected by the Probate Court, which determined that the Living Trust was genuine, valid, and untainted by misconduct. ER 4717.

In entering its judgment, the District Court concluded that it would not reach the issue of whether Pierce committed any discovery abuse. ER 8-9. Accordingly, the court expressly declined to consider the appropriateness of the Bankruptcy Court's sanctions. *Id.*

On May 2, 2002, the District Court denied Vickie's motion to alter or amend its judgment to increase Vickie's award. ER 126. On June 3, 2002, Pierce filed a timely notice of appeal seeking review of the District Court's judgment in this Court. ER 5492.

* * *

IV. The District Court Violated Pierce's Due Process Rights.

As the Supreme Court has stated, "[t]he one who decides must hear." *Morgan v. United* States, 298 U.S. 468, 481 (1936). As Justice Frankfurter explained, the ancient maxim "[a]udi alteram partem – hear the other side! – a demand made insistently through the centuries, is now a command spoken with the voice of the Due Process Clause." *Caritativo v. California,* 357 U.S. 549, 558 (1958) (Frankfurter, J., dissenting).[27]

In this case, the District Court violated Pierce's due process rights by refusing to allow Pierce to call percipient witnesses that would have testified in his favor. Although the District Court permitted Vickie to call all of the witnesses that she wanted to call, the court denied Pierce the reciprocal opportunity. As a result, the proceeding was fundamentally unfair. Indeed, Pierce has never had the chance to fully and fairly present his case in any federal proceeding. Moreover, instead of permitting Pierce to

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[27] This maxim is truly ancient. As one court has put it: "The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence." *The King v. The Chancellor, Masters and Scholars of the University of Cambridge,* 1 Str. 557, 567, 93 Eng. Rep. 698, 704 (1723); *see Phillips v. Crown Cent. Petroleum Corp.,* 556 F.2d 702, 705 (4th Cir. 1977) ("One must hear before one decides. Audi alteram partem is a fundamental rule of procedural fairness."); *NLRB v. Supreme Bedding & Furniture Mfg. Co.,* 196 F.2d 997, 998 (5th Cir. 1952) ("[A]udi alteram partem. It is this promise which, in a judicial or quasi-judicial hearing, demands and, if kept, insures as far as is humanly possible that 'knowledge will precede understanding, understanding will precede judging,' and the judgment will be impartial and just."); Kelley, *Audi Alteram Partem,* 9 Natural Law Forum 103 (1964) (tracing maxim).

present his case, the court engaged in impermissible review of the probate proceedings. As a result, the District Court's judgment must be set aside.

As the District Court conceded, its view of the credibility of the witnesses was critical to its decision. By excluding Pierce's witnesses, however, the court denied Pierce the opportunity to corroborate both his testimony and the testimony of other critical witnesses that the court disregarded. The court also denied Pierce the opportunity to rebut the court's innumerable inferences and speculations about critical events.

Although the court may have reviewed certain depositions taken in connection with the probate trial, the depositions typically did not include questioning by counsel for Pierce. Thus, the testimony was not full and complete and, in any event, was no substitute for the live testimony that the District Court heard at Vickie's request. The court also relied on its review of such items as entries from billing statements, but did not take any testimony from the authors of those entries. ER 8, 38. This is important because their testimony would have disproved the court's inferences.

Over forty witnesses testified in the Probate Court in a complete airing of all the issues. After hearing all of the evidence, the Texas jury reached a verdict diametrically opposed to the District Court's judgment. Pierce respectfully submits that, if the District Court had heard all of the witnesses and evidence, it would have reached the same conclusion as the Texas court.

The District Court conducted what it styled a "*de novo*" review of Vickie's claim. ER 3, 68. In doing so, the court directed that it would rely in large part on the record

in the Bankruptcy Court. ER 4, 7, 9. As discussed previously, however, the five-day proceeding in the Bankruptcy Court was severely truncated, with the most critical facts "deemed" to exist in Vickie's favor. Accordingly, the bankruptcy proceedings offered only a meager record from which the District Court might conduct its analysis.

The District Court also directed that it would rely on the record in the Probate Court, which constituted a much richer source of information. ER 8. At the same time, however, the District Court refused to be bound by any of the Probate Court's rulings, including its factual determinations. Inevitably, this placed the District Court in the position of sitting in direct review of the probate proceeding with complete discretion to substitute its judgment for that of the Probate Court and jury. As indicated previously, this constituted a clear violation of the *Rooker-Feldman* doctrine. Moreover, because the District Court revisited issues resolved by the Texas jury (e.g., the validity of J. Howard's estate plan), its review also violated the Seventh Amendment. *See* U.S. Const., Seventh Amend. (proscribing review of jury verdicts except as permitted at common law).

The Probate Court determined on the basis of a proper proceeding and a jury verdict that J. Howard never intended to give Vickie a gift; that his estate planning instruments were valid and untainted by misconduct; and that Vickie had no claim against Pierce. If the District Court wished to revisit these determinations (and was not otherwise barred from doing so), it was required to conduct its own complete trial. This included permitting Pierce to put on his entire case in his defense.

The District Court further erred by considering the statements of two individuals, Donald J. Fandry and J.L. Hale, Jr., regarding Vickie's allegations that the Living Trust had been improperly altered or forged. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). Neither individual was qualified as an expert, and the District Court never conducted a hearing to determine the reliability of their statements. *See Mukhtar v. California State Univ.*, 299 F.3d 1053, 1066 (9th Cir. 2002) ("some . . . reliability determination must be apparent from the record before we can uphold a district court's decision to admit expert testimony"), *amended*, 319 F.3d 1073 (9th Cir. 2003) (internal quotation omitted); *see also Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137, 158-59 (1999) (Scalia, J., concurring) (" . . . discretion in choosing the manner of testing expert reliability . . . is not discretion to abandon the gatekeeping function").

Moreover, neither Fandry nor Hale actually testified in *any* court on the issues that the District Court accepted as true. Thus, they were not subject to cross-examination. Nor could the court assess their credibility. Accordingly, the court improperly considered their hearsay statements to conclude that the Living Trust was altered or forged. *See* Fed. R. Evid. 801, 802, & 702; *Daubert*, 509 U.S. at 595 (noting the importance of "[v]igorous cross-examination" to guard against "shaky" evidence). In addition to violating applicable legal standards, the District Court's consideration of the statements of Fandry and Hale was also plain error. *See* Fed. R. Evid. 103(d); *Beachy v. Boise Cascade Corp.*, 191 F.3d 1010, 1016 (9th Cir. 1999) (standard for plain error).

The District Court also violated Pierce's due process rights when, without notice, it summarily ruled without a

hearing on October 23, 2001 that Pierce had waived his attorney-client privilege and handed Pierce's privileged communications to opposing counsel. To comply with the court's earlier order, Pierce had arranged for delivery of over 400 boxes of documents, including the files of Pierce's counsel in the probate case, to a warehouse in El Segundo, California. Although the court had assured Pierce that it would review the files of Pierce's counsel *in camera* to make a privilege determination, the court simply ruled – without any review – that Vickie's counsel could have access to all of them. This was also error, and the District Court's judgment must be set aside.

V. The District Court's Factual Determinations Are Clearly Erroneous.

Finally, the Court should reverse the District Court's judgment because the court's factual determinations are contrary to the record, are unsupported by it, and are based on improper speculation and inference.

In order for Vickie to prevail on her claim of tortious interference with an expectancy of a gift (assuming that such a cause of action exists), she was required to demonstrate at least three factual predicates: (a) J. Howard intended to give her a gift (other than the gifts that he actually gave her during his lifetime); (b) Pierce thwarted J. Howard's intent by independently tortious means; and (c) Vickie has suffered damages. As the Probate Court held, the evidence demonstrates that J. Howard did not intent to give Vickie a gift (other than the gifts that he actually gave to her during his lifetime). In addition, the evidence shows that Pierce did not thwart J. Howard's intent, and that Vickie has suffered no damages.

In concluding otherwise, the District Court improperly converted its authority to reject the credibility of all of the witnesses (including Vickie) into the power to create facts that are not in evidence. *See Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485, 512 (1984) ("when the testimony of a witness is not believed, the trier of fact may simply disregard it" but "the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion."); *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573, 576 (1951) ("disbelief of testimony would not supply a want of proof"); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1057 (9th Cir. 1990) ("discredited testimony is not [normally] considered a sufficient basis for drawing a contrary conclusion") (brackets in original); *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987) (same); *Safeway Stores, Inc. v. White*, 348 S.W.2d 162, 165 (Tex. 1961) (same); *R.T. Herrin Petroleum Trans. Co. v. Proctor*, 338 S.W.2d 422, 427 (Tex. 1960) (same).

In addition, the District Court improperly rested its conclusions on conjecture regarding the relevant events and the motives of the parties. *See Goldhirsh Group, Inc. v. Alpert*, 107 F.3d 105, 108-09 (2d Cir. 1997) (findings cannot rest on "sheer surmise and conjuncture" and "[t]here must be some affirmative evidence that the event occurred"); *Fineman v. Armstrong World Indus.*, 980 F.2d 171, 191 (3d Cir. 1992); *see Neely v. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341, 346 (9th Cir. 1978) (finding that the "meager evidence" presented by the plaintiff would not "rationally support" a verdict in his favor because "[i]n order to draw one of the two inferences necessary to a finding of liability against either of the defendants, a jury would inevitably have to rely in large part upon surmise and speculation"); *Wolf v. Reynolds Elec. & Eng'g Co.*, 304

F.2d 646, 649 (9th Cir. 1962) ("The verdict of a jury cannot rest on guess or speculation."); *Marathon v. Pitzner*, 2003 WL 21197255 at *2 (Tex. 2003) ("an inference stacked only on other inferences is not legally sufficient evidence"); *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 927 (Tex. 1994) ("suspicion linked to other suspicion produces only more suspicion, which is not the same as some evidence"); *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 323 (Tex. 1984) (inferences drawn from equivocal circumstantial evidence are inadequate).

The District Court also based its conclusions on what it assumed to be the propensities of the parties to take certain actions. A trier of fact, however, may not presume that a party has a particular propensity based on speculation about the party's motives, character, or other acts, and then infer that, because of this propensity, certain key allegations are therefore established as fact. See Fed. R. Evid. 404(a). For example, as this Court has explained, "[i]t is only where a particular act is shown independently to have been done that thereafter other acts may be proved to show the intent with which it was done." *Smallfield v. Home Ins. Co. of New York*, 244 F.2d 337, 340 (9th Cir. 1957); see *Hynes v. Coughlin*, 79 F.3d 285, 291 (2d Cir. 1996). Because the District Court's methodology was entirely improper, its findings must be set aside.

A. J. Howard Did Not Intend To Give Vickie a Gift Other than the Gifts that He Actually Gave Her During His Lifetime.

As part of her testimony in both the District Court and the Probate Court, Vickie alleged that J. Howard promised to give her half of all of his assets. ER 2762, 2282-83, 5817-27, 3606-07. The Texas jury, however, did

not believe this testimony. ER 3782. Neither did the District Court, concluding that J. Howard never intended to give her such a gift. ER 71, 73-74. Instead, contrary to Vickie's testimony and the testimony of *every other witness,* the District Court determined that J. Howard intended to give Vickie a gift worth tens of millions of dollars based on the appreciation of the value of the Koch stock that MPI owned. ER 74, 78.

There is no evidence establishing the gift that the District Court found to exist. Instead, the District Court based its conclusion regarding J. Howard's donative intent on a series of layered, speculative inferences. The court's inferences, however are insufficient as a matter of law to support its conclusion.

1. The Prenuptial Agreement

The District Court cited the draft prenuptial agreement as evidence of J. Howard's donative intent. ER 31-32, 71. Under the agreement, however, Vickie's entitlement was restricted to $100,000 for each month of marriage, less the value of any gifts that J. Howard gave to her during the marriage. ER 478, 480, 4897-4902. If anything, this document demonstrates that J. Howard wanted to limit Vickie's entitlement, not expand it, and supplies no basis for the conclusion that he intended to give her a gift worth tens of millions of dollars.

2. Lavish Gifts

The District Court referred to the fact that J. Howard gave Vickie lavish gifts as evidence of his donative intent, citing the parallel treatment of Lady Walker. ER 31, 71. It is true that J. Howard gave lavish gifts to both Lady

Walker and Vickie. This observation, however, is not evidence that J. Howard intended to give Vickie a further gift worth tens of millions of dollars.

Indeed, reference to J. Howard's treatment of Lady Walker actually refutes the court's analysis because, as with Vickie, J. Howard clearly intended to provide for Lady Walker only with the gifts that he actually gave her during his lifetime. There is no evidence that J. Howard ever intended to include Lady Walker in his estate plan or give her an interest in his stock holdings, and the same holds true for Vickie.

3. Compagnie Victoire and Marshall Farms Corporation

The District Court cited the creation of Compagnie Victoire and the Marshall Farms corporation as evidence of J. Howard's donative intent. ER 32. Again, however, that fact that J. Howard created these two corporations for Vickie's benefit does not suggest (let alone demonstrate) that he therefore intended to give Vickie any other gift. On the contrary, the fact that J. Howard carried through with these gifts undercuts the District Court's analysis because it demonstrates that J. Howard implemented the gifts that he actually intended Vickie and Lady Walker to receive.

Moreover, J. Howard also set up corporate enterprises for Lady Walker (e.g., Coliseum Oil and Gas). Yet, J. Howard did not thereby intend to giver her a large share of his assets worth tens of millions of dollars. Again, the fact that J. Howard gave Vickie and Lady Walker specific gifts is not evidence of any intent to give either of them anything else.

4. Catch-All Trust Reference in the Townsend Letter

The District Court cited the unadorned reference to a "catch-all trust" in Townsend's letter of December 15, 1992 as evidence of J. Howard's donative intent. ER 32, 71. The only evidence regarding this reference, however, is that no one can explain exactly what it means and that J. Howard never pursued it. ER 5791-97, 5810-16, 5838-43. Under the circumstances, the District Court's conclusion that the reference is evidence of J. Howard's intent to provide Vickie with a gift worth tens of millions of dollars is pure conjecture.

The record demonstrates that J. Howard periodically came up with ideas regarding how to structure his gift-giving. The record also demonstrates that he pursued the ideas that he wanted to pursue, and abandoned those that he did not. The fact that J. Howard never again brought up the "catch-all trust" idea after Townsend's letter suggests only that he never intended to implement it. Further, the amorphous term "catch-all trust" could refer to any number of trust concepts as well as any number of beneficiaries. The concept has no special significance for trust or estate planning purposes. Without more, the mere reference to a "catch-all trust" in a letter from one of J. Howard's lawyers to another is not evidence of any specific intent to create any specific trust or other gift for Vickie.

5. Time Records

The District Court referred to three entries in the billing records of Glynn Blazier, one of Edwin Hunter's partners, as evidence that J. Howard intended to establish

a "catch-all" trust of some kind for Vickie. ER 38. Each of the entries, however, appear on a bill regarding work undertaken in connection with the creation of Compagnie Victoire, the corporation that J. Howard created for Vickie's benefit and that was incorporated on December 30, 1992. ER 578, 564, 5048. Although the billing entries mention the word "trust," they do not elaborate on the concept, and there is no evidence linking the bare reference to the term "trust" in the billing entries to either (a) the "catch-all trust" idea in Townsend's letter, or (b) the creation of a gift for Vickie worth tens of millions of dollars. Indeed, the only evidence is that there is no such link.

Specifically, Hunter testified that neither he nor anyone at his firm drafted a "catch-all trust" for Vickie. ER 4950-52. Glynn Blazier, the author of the billing entries, was not permitted to testify, and thus had no opportunity to explain his records (which would have clarified the matter). During Hunter's testimony, Hunter was asked about Blazier's entries. Hunter stated that they related to the ideas of placing the stock of Compagnie Victoire in trust for Vickie, or the creation of a voting trust for the corporation. ER 4945-49. He specifically denied that they had anything to do with a "catch-all trust." *Id.*

The District Court discredited these explanations. ER 38-39. The court's unwillingness to accept Hunter's testimony, however, does not justify the court's speculative inference that Blazier's mention of the term "trust" in his billing entries must therefore have meant a "catch-all trust" as referenced in Townsend's letter. More important, it did not justify the court's speculative inference that the reference to the term "trust" meant that J. Howard

intended to give Vickie a gift worth tens of millions of dollars. ER 37-39.

6. Deemed Finding

In a footnote, the District Court concluded erroneously and contrary to the evidence that the record establishes the existence of a "draft 'catch-all' trust instrument prepared by Edwin Hunter." ER 32, n.17. In the same footnote, the District Court added that, if it had not reached this conclusion regarding the "catch-all trust" based on the alleged evidence, "the discovery abuses in this case *might* have led the Court to deem this fact as established as a sanction." *Id.* at n.17 (emphasis added). There is, however, no basis for this conclusion.

As explained above, Pierce did not commit discovery abuse in this case. On the contrary, Pierce is the victim of discovery abuse. At great expense, Pierce was forced to respond to duplicative discovery demands on the same claim in three separate proceedings in three different courts: the Probate Court, the Bankruptcy Court, and the District Court. Moreover, in this instance, the District Court clearly abused its authority by turning over all of Pierce's materials, including his privileged documents, to Vickie. In any event, the District Court did not actually find that the evidence warranted a sanction against Pierce, and no sanction is, in fact, warranted.[28]

[28] The District Court stated that it ordered Pierce to produce "several hundred boxes of documents previously withheld" and that Pierce in fact produced over "400 boxes." ER 8. Although it is true that Pierce produced over 400 boxes, it is not true that any of the materials (other than the confidential and privileged files of Pierce's counsel) were

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7. Sorensen's GRIT Idea

Sorensen testified that, as part of his exploration of several estate planning ideas for J. Howard, he considered the creation of a GRIT (grantor retained interest trust). ER 504-505, 4906-07. Sorensen also testified, however, that he did not implement this idea, and J. Howard rejected. ER 5798-5803. Nevertheless, the District Court cited Sorensen's idea as evidence of J. Howard's donative intent, commenting that the GRIT "was never produced." ER 38. Logically, the reason why the GRIT was never produced was because it was never anything but an idea. There is no evidence to the contrary, and the court's speculative inference that the idea is evidence of J. Howard's intent is unsupported.

8. The New Community Memo

Sorensen testified that J. Howard asked him to explore the idea of creating a option for Vickie based on the potential increase in dividends on the Koch stock that MPI owned, provided that the option would not trigger tax liability. ER 3181-82, 4878. Sorensen memorialized his discussion with J. Howard in the New Community Memo discussed previously. ER 562. Sorensen testified further that, after he informed J. Howard that the option would generate a tax liability, J. Howard told him to drop the idea. ER 3178-79, 4929, 4930.

The District Court cited the New Community Memo as evidence of J. Howard's intent to give Vickie a large gift worth tens of millions of dollars. ER 34. There is no evidence,

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"previously withheld." Once again, there is no evidence to support the court's commentary.

however, to support this conclusion. On the contrary, once again, the only evidence is that J. Howard did not intend to pursue the idea.

The District Court stated that it believed that J. Howard intended to pursue the gift idea on the theory that J. Howard wanted to provide Vickie with the benefit of his "new community" in the same manner as he had allegedly provided for his deceased wife, Bettye. ER 73. J. Howard, however, never established any such type of "new community" interest for Bettye. ER 177. Sorensen testified that, in reference to Bettye, the concept of "new community" merely distinguished between J. Howard's community property with Bettye, versus his community property with his first wife, Eleanor, which he referred to as "old community." ER 3169-70. Sorensen never testified that J. Howard ever created a special gift or option for Bettye along the lines set forth in the New Community Memo. Accordingly, there is no basis for the court's speculation that J. Howard intended to give Vickie a "new community" gift worth tens of millions of dollars because he had done so for Bettye.[29]

Moreover, the New Community Memo itself sets out a formula specifying the precise contours of J. Howard's option idea. ER 562-63. The formula tied the option to certain criteria, including an increase in the dividends on the Koch stock and prevailing interest rates. ER 562-3, 3171-72. The only evidence is that, if J. Howard had

[29] The District Court also misquoted Sorensen's testimony on the alleged point that the "new community" concept "'was Mr. Marshall's words.'" ER 33. Sorensen, however, never said this, and the court improperly interlineated the quoted language as though it were part of Sorensen's testimony. ER 33, 3170.

implemented his idea, Vickie would have been entitled to little or nothing under the formula. ER 5113-14, 5116. Accordingly, far from demonstrating J. Howard's intent to give Vickie a gift worth tens of millions of dollars, the New Community Memo actually demonstrates the opposite.

9. Interest in Having Children

The District Court cites J. Howard's interest in having a child with Vickie as evidence of his donative intent on the theory that, if J. Howard had conceived a child with her, he would have wanted to support the mother of his child. ER 34. J. Howard, however, did not have any children with Vickie. Accordingly, the predicate for the District Court's assumption did not occur. More important, the court's assumption is not evidence of actual donative intent.

Further, in the only document that addresses this subject directly – the draft prenuptial agreement – J. Howard provided that, in the event he had a child with Vickie, he would place $5 million in trust for her benefit for her lifetime. ER 478. This further undercuts the court's assumption that J. Howard intended to give Vickie an outright gift worth tens of millions of dollars because he thought about having a child.

10. Adoption of Vickie's Son

The District Court cited the idea that J. Howard may have considered the adoption of Vickie's son Daniel as evidence of his donative intent. ER 27. J. Howard, however, never adopted Daniel. ER 2614, 3429-30, 5271. More important, this "idea" is not evidence that J. Howard intended to give Vickie a gift worth tens of millions of

dollars. The record demonstrates that J. Howard intended to provide for Vickie with the more than $6 million in gifts that he gave to her, which he believed would be more than sufficient for her support. *See* 2961-65, 2584, 3088-89, 5265-67, 5271-72.

11. Statement of Support

During the course of the guardianship proceedings, Vickie visited J. Howard with a tape recorder, exposed her breasts, and attempted to have him repeat statements into a microphone that she wanted him to make. ER 3698-3700.[30] One of the statements was "I want my wife to be supported by me." ER 31, 760.The District Court cites this as evidence of J. Howard's donative intent. ER 31. The fact that J. Howard wanted to support his wife, however, is not evidence that he harbored an unfilled intent to give her a gift worth tens of millions of dollars. The record demonstrates that J. Howard intended to support his wife with the gifts that he actually gave to her, and there is no evidence that he thought these gifts were inadequate. ER 2604. In fact, the evidence is that J. Howard believed his gifts to Vickie were sufficient, and that he wanted Pierce to receive the bulk of his assets as set forth in his estate plan. ER 3343-47, 5006, 5108-09, 5265-67, 5271-72.

[30] One of the witnesses testified that, during this encounter, Vickie told J. Howard what to say and then switched on the tape expecting him to repeat what she had just said. When he refused, Vickie would switch off the tape and then scold him for not repeating what she had said. ER 3438-39.

12. Motive

Finally, the court below inferred that J. Howard intended to give Vickie a large gift on the inference that Pierce and others had a motive to prevent her from receiving such a gift because it would mean less for them. ER 47-48. This was clearly improper. Under the court's approach, it would always be possible to prove intent to give a gift simply by showing that the gift was not given and someone else benefited as a result. The court's speculation is no substitute for proof of J. Howard's actual donative intent.

B. Pierce Did Not Interfere with any Alleged Gift to Vickie.

The second critical element of Vickie's alleged cause of action is that Pierce interfered with J. Howard's intent to give her a gift by independently tortious means. In this case, Pierce never interfered with any gift to Vickie, and there is no evidence that Pierce committed any tortious act. In particular, no witness testified that Pierce interfered and there is no other evidence of interference. On the contrary, all the evidence is that he did not interfere in any way with his father's intended gift-giving to Vickie. ER 2303, 2605, 4882-86, 4912-13, 4920-21, 4928, 5045, 5148-49. Once again, the District Court's conclusions are contrary to the evidence and are based exclusively on inappropriate speculation.

1. Pierce's Alleged Knowledge and Motivation

The District Court begins its analysis of Pierce's alleged interference by speculating that Pierce might have had a motive for preventing Vickie from receiving a large

gift. In support of this speculation, the court states that Pierce was present at meetings during the late Fall of 1992 at which J. Howard detailed the gifts that he wanted to give Vickie. ER 33, 47. The evidence, however, is that Pierce never attended any such meeting. ER 4912-13, 4920-21.

For example, the District Court believed that Pierce attended a critical meeting on December 22, 1992 with J. Howard, Hunter, Townsend, and Sorensen to review matters related to Vickie. ER 33. The only evidence, however, is that Sorensen met alone with J. Howard on December 21, 1992 to discuss matters relating to Vickie, and that neither Pierce, Townsend, nor Hunter attended. ER 4928, 4904-05, 4920-21. Although Sorensen met again with J. Howard on December 22, 1992 to execute his Will and an amended and restated living trust instrument, there was no discussion about Vickie with Pierce. ER 4928-29, 4912, 4920-1. The District Court's conclusion that Sorensen met with Pierce and others to discuss matters relating to Vickie is baseless.

The District Court speculated further that Pierce would have been troubled by J. Howard's gift idea set forth in the New Community Memo. ER 47. Apart from the fact that Pierce was completely unaware of this idea, the court's analysis ignores the only evidence on the subject – that J. Howard himself instructed Sorensen to drop the matter because of its tax implications. ER 4927-30, 3172. Moreover, under the option formula set forth in the memo, Vickie would have been entitled to little or nothing. ER 5536-37, 5113-17.

The court speculates that Pierce may have wanted to prevent a gift of any interest in the Koch stock to Vickie

because this might have had an adverse effect on tax litigation with the IRS by establishing an unfavorably high value for the Koch stock. ER 54. The gift formula referenced in the New Community Memo, however, was the same formula appearing in MPI's by-laws that J. Howard used to value the Koch stock that MPI owned. ER 3169-71. Because the formulas were the same, there is no basis for the District Court's speculation that giving Vickie a gift under the terms of the New Community Memo would place a higher value on the Koch stock than would otherwise apply.

2. Alleged Firing of Sorensen

The District Court cited Pierce's alleged firing of Sorensen as evidence of his intent to prevent Vickie from receiving her alleged gift. ER 48. Once again, there is no evidence to support this contention. Pierce testified that he did not fire Sorensen, and Sorensen testified that he was not fired. ER 4934-35, 5761, 5764-66.

In support of its conclusion, the District Court cites exclusively to a letter in the record that Pierce sent to Sorensen. ER 48. This letter, however, merely asks Sorensen to suspend work temporarily on a tax audit that he was performing pending further events and discussions. ER 579. This is hardly evidence that Sorensen was fired, let alone that Pierce intended to thwart a gift to Vickie.[31]

[31] The District Court also determined that "when Pierce suggested to J. Howard that Hunter replace Sorensen, J. Howard consented." ER 48-49. Like the allegation that Pierce fired Sorensen, there is no evidence to support this allegation and it is purely speculative conjecture.

3. 1993 Estate Planning Changes

As detailed previously, in 1993 J. Howard instructed Hunter to make a number of changes to his estate plan. J. Howard wanted to make these changes in order to facilitate his three goals of giving most of his assets to Pierce, maximizing his income to fund his lifestyle, and minimizing the estate taxes that would have to be paid once he passed away. Obviously, a key feature of J. Howard's plan was to give away his assets, which is, after all, one of the basic points of any estate plan.

There is no evidence that any of the 1993 estate planning transactions were either illegal or other than exactly what J. Howard instructed. The District Court conceded that J. Howard's reduction of his interest in MPI to a minority stake was a valid estate planning move. ER 49. Nevertheless, contrary to all of the evidence, the court also concluded that the 1993 changes constituted a plot to "drain" J. Howard of his property. *Id.*

The court based this conjecture on the incorrect premise that "J. Howard . . . had never voluntarily given up control of anything in his life." *Id.* But beginning most notably with his gift of all of his Koch voting stock to his two sons in 1974, J. Howard routinely gave up control of his assets, including making large gifts to Lady Walker, Vickie, various charities, and members of his immediate family.[32]

[32] The District Court speculated in a footnote that J. Howard might have found another way to give up control of MPI without actually giving up control, such as by granting an irrevocable proxy to his former wife Eleanor, which J. Howard could then vote surreptitiously.
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The District Court also speculated that J. Howard was "capable of being controlled by Hunter and Pierce because of his physical inability to read." ER 50. Again, the evidence is that J. Howard was able to read. ER 2597, 3647-48. Likewise, there is no evidence that J. Howard was "capable of being controlled."

There is also no evidence to support the court's determination that J. Howard would not have read the 1993 documents because he "wanted legal documents that were a page or two long." ER 49-50. Since 1982, most of the estate planning documents that J Howard executed were more than a page or two long, and it is implausible that, during his long business career, J. Howard only executed documents of extremely short length. The court's commentary is, again, pure conjecture.[33]

4. Fine Tuning Outline and 1994 Estate Plan Changes

Following his wedding to Vickie in 1994, J. Howard again requested that Hunter make changes to his estate plan. ER 3248-50, 5064-65. As explained previously, his goals in doing so were to prevent Vickie from making any subsequent alterations to his plan in the event he became disabled, to prevent Vickie from claiming more from his

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ER 49 n.29. The court's advice, however, would probably constitute a species of tax fraud under section 2036 of the Internal Revenue Code.

[33] In a footnote, the District Court suggested that, although Pierce executed the Pierce Note for $17.5 million in exchange for the 35,466 MPI shares that he bought from his father in 1993, Pierce managed to avoid making any payments on this note. ER 50 n.31. This statement is baseless. Pierce made, and continues to make, all required payments. ER 5353.

estate than what he gave her as gifts, and to confirm his intention to leave most of his assets to Pierce. ER 3250-51, 3265, 4964-66, 3253-56, 2633.

There is no evidence that any of J. Howard's 1994 estate planning transaction were illegal or contrary to his express instructions. Nevertheless, the District Court determined that they were implemented as part of an ongoing plot to strip J. Howard of his property to prevent a gift to Vickie. ER 54-58.

In support of its theory, the court cited Hunter's Fine Tuning Outline that he prepared during the course of implementing J. Howard's 1993 estate planning instructions. ER 54. The court determined that the outline reflected Pierce's efforts to prevent Vickie from receiving a gift. ER 54. The only evidence, however, is that the outline reflects Hunter's notes and comments regarding how to implement J. Howard's wishes. ER 5623. Moreover, the only evidence is that Pierce had nothing to do with the outline and that he was not even aware of its existence. ER 5069-70.

Rejecting this testimony, the District Court determined that Hunter faxed the Fine Tuning Outline to Pierce on July 8, 1994. ER 41. But the evidence is that Hunter did not fax the outline to Pierce. ER 3062-66. Although Hunter sent a fax to Pierce on that day, the evidence is that the fax was not the Fine Tuning Outline. ER 5069-70. During this period, Pierce was asked to supervise Hunter's handling of a tax matter involving Pierce's mother, Eleanor. ER 3228-31. Although Hunter and Pierce discussed this tax matter, they did not discuss J. Howard's estate plan changes. ER 3228-3231.

Disregarding all of the foregoing, the court simply assumed the opposite of the evidence as established truth. This was clear error. Moreover, even if Pierce had been aware of the Fine Tuning Outline (which he was not), there is simply no evidence that any of J. Howard's estate planning instructions were anything other than what J. Howard intended.

5. The Irrevocable Living Trust

The District Court further concluded that J. Howard's decision to make the Living Trust irrevocable was evidence of Pierce's interference. ER 56-57. The only evidence, however, is that it was J. Howard's decision to make the trust irrevocable and that Pierce had nothing to do with it. ER 2266, 2293, 2596, 2633-34, 2669. Once again, the court disregarded the testimony and then improperly assumed the opposite of the testimony to be true.

Contrary to the evidence, the District Court made three mutually inconsistent factual determinations in support of its interference theory: (a) J. Howard was not able to read the Living Trust when he signed it, (b) the Living Trust was forged, and (c) after J. Howard signed the Living Trust, critical pages were substituted. Taken cumulatively, these "findings" make no sense.[34] More

[34] If J. Howard were unable to read, presumably he could have been led to sign anything and there would have been no reason to forge his signature or substitute any pages. If he signed the document, then it was not forged. If it was forged, then he did not sign the document and there would have been no reason to substitute any pages. If pages were substituted after he signed the document, then there would have been no reason for it to be forged. In fact, none of these assertions are true, and all are pure conjecture.

important, the evidence is that J. Howard could read ER 2597, 3647-48; that he signed the Living Trust of his own free act and deed ER 2410, 2633-34; and that no pages were substituted after he signed the document. ER 3137-38. Further, there is no evidence that Pierce had anything to do with any allegedly improper conduct.

On July 12, 1994, J. Howard instructed Hunter to prepare the Living Trust instrument overnight. During the course of editing the document prior to delivering it to J. Howard the next day, individual pages were undoubtedly printed and substituted for pages with errors. No witness testified that anyone substituted any pages *after* J. Howard executed the document. Indeed, the testimony is that there were no such substitutions. ER 3137-38. Further, no witness testified that the document was forged. Again, the court's factual determinations are pure speculation.

In support of its conclusion that the Living Trust was illegitimate, the court relied on the hearsay statements of two purported "expert" witnesses, Fandry and Hale. As explained previously, the court's acceptance of the statements of Fandry and Hale was improper. Moreover, both individuals determined only that certain pages had been substituted, not *when* they were substituted (i.e., before or after J. Howard signed the document). Again, there is no evidence that the pages were substituted after J. Howard executed the trust or, in any event, that Pierce had anything to do with any substitution.

The court also found that Fandry and Hale determined that the Living Trust had been forged. ER 64, 65. This characterization, however, is inaccurate. Neither

made this determination.[35] In contrast, Pierce's expert, Jeanette Hunt, testified that J. Howard's signature was genuine. ER 3002-03, 3004-05. In any event, even if the document was forged (which it was not), there is no evidence that Pierce had anything to do with any alleged forgery.

The District Court further supported its interference theory by determining that J. Howard had been "stripped of his remaining assets and was technically broke." ER 56. In fact, however, the only evidence is that J. Howard had not been stripped of his remaining assets. Although J. Howard made numerous transactions to divest himself of certain assets in his Living Trust for estate planning purposes (e.g., the MPI stock) and to satisfy certain of his debts to MPI, the record demonstrates that he received in exchange income producing assets to fund his lifestyle, such as the $17.5 million Pierce Note. During the same period, J. Howard continued to borrow from MPI to make further gifts to Vickie.

The court also based its interference conclusion on its determination that J. Howard was unaware that the Living Trust was irrevocable. ER 56. Specifically, the court cited the testimony of Glenn Johnson, who stated that, a year after J. Howard executed the Living Trust, he understood that it was irrevocable but believed that "he could change it." *Id.* The court concluded that J. Howard's statement that he could make changes demonstrated that he did not understand that his trust was truly irrevocable. ER 56.

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[35] On the genuineness of J. Howard's signature, Fandry and Hale were both "inconclusive." ER 5706.

In fact, J. Howard's statement was perfectly accurate, and the court confused the concepts of irrevocability with J. Howard's retained power to make certain changes. As explained previously, even though J. Howard had made the trust irrevocable, he retained the power to eliminate Pierce as a beneficiary, to add charities as beneficiaries, and to borrow money against the trust's assets – including to make gifts to Vickie.

Finally, the court cites the recording of the Living Trust in Glasscock County in support of its theory that Pierce interfered. ER 57. The court speculates that Townsend recorded the Living Trust in this county to avoid J. Howard learning of its terms. ER 57. The only evidence, however, is that Townsend recorded the Living Trust in eighteen counties (including the country where J. Howard lived) in order to provide constructive notice of the trust's real estate interests, and there is no evidence to the contrary. ER 3639-40. In addition, there is no evidence that Pierce instructed Townsend where to record the document or in what order.

6. The June 1 Note

As explained previously, as of June 1, 1994, J. Howard had borrowed an additional $5,618,074 from MPI to fund his lifestyle and this debt had to be documented. ER 633. To document his debt, J. Howard executed a note to MPI and pledged his interest in the $17.5 million Pierce Note to secure the note. ER 630. The only evidence is that this was a routine business transaction that J. Howard instructed be done.

Disregarding the testimony, the District Court stated that J. Howard's decision to pledge the Pierce Note to

secure his debt is further evidence of Pierce's interference because, by pledging the note, Pierce could "intercept" the payments and, thus, prevent Vickie from ever receiving them. ER 55. The mere taking of a security interest by MPI, however, did not give Pierce this power. In addition, the amount of the $17.5 million Pierce note was three times the amount of J. Howard's $5.6 million debt, leaving J. Howard a large interest in the note even if the note were used to satisfy his debt. More important, there is no evidence that J. Howard ever intended to give his interest in the Pierce Note to Vickie, and, thus, the court's determination that the note was pledged to avoid a gift to Vickie is, once again, pure conjecture. Nor is there any evidence that Pierce had anything to do with J. Howard's decision to pledge the Pierce Note.

The court also determined that, because J. Howard's note to MPI for $5,618,074 was dated June 1, 1994, it must have been "backdated" because the court believed that it was executed later. ER 55, 56. In fact, the note merely stated J. Howard's *indebtedness* as of a particular date – June 1, 1994. There is no evidence of any backdating, let alone that Pierce participated in it, and the court's determination is again purely speculative.

7. Surveillance of J. Howard

The District Court concluded that the surveillance of J. Howard after his wedding is further evidence of Pierce's interference. ER 50-51. The only testimony, however, was that the surveillance was put in place for J. Howard's protection after J. Howard's staff learned that Vickie's bodyguard had a record of multiple felonies. ER 3426-28, 5318-19. There is no evidence that any of the persons

engaged in the surveillance ever prevented, or attempted to prevent, J. Howard from doing anything, or that anyone instructed them to do so. Accordingly, the court's conclusion is pure speculation and the surveillance is not evidence of any interference with J. Howard's intent to give a gift to Vickie, let alone interference by Pierce.

8. Subsequent Estate Planning Changes

Prior to J. Howard's death, he instructed or approved several final estate planning transactions. The District Court cited these as further evidence of Pierce's interference. ER 57-60. There is no evidence, however, to support the court's conclusions.

The court observed that the trustees of the Living Trust re-sited the trust from Texas to Louisiana. ER 68. There is no evidence that this was done to prevent a gift to Vickie. If J. Howard had wanted to make a gift to Vickie, changing the situs of the trust would have made no difference.

The court stated that, on December 28, 1994, Pierce executed a document renouncing J. Howard's right to all income from the Living Trust. ER 67. Pierce, however, never executed any such document. The Act of Renunciation merely renounced the Living Trust's liability for obligations incurred by J. Howard's *estate* after he died. ER 703, 3067-68. Accordingly, the document is not evidence of any effort to thwart a gift to Vickie by stripping J. Howard of his income. In addition, the only evidence is that Pierce executed the document with J. Howard's consent using his power of attorney. ER 3067-68.

On May 26, 1995, J. Howard sold 63,051 shares of MPI stock to MPI in exchange for a private annuity. ER 768-71, 2636, 3278-3284. The court determined that this was further evidence of interference because "MPI ended up paying nothing for J. Howard's remaining shares." ER 59. There is no evidence to support this conclusion. In fact, MPI did make payments under the terms of the annuity. ER 5353. In addition, the only evidence is that the sale was undertaken at J. Howard's instruction. ER 2636, 5831-32, 5836. Further, there is no evidence that J. Howard ever intended to give any of his shares of MPI stock to Vickie. Even after the transaction, J. Howard's Living Trust still had many valuable assets and he had access to cash. Thus, there is no basis for the conclusion that the sale was intended to thwart a gift to Vickie.[36]

9. Allegedly Tainted Documents

Finally, the District Court concluded that various documents had been "destroyed, backdated, altered, or prepared and presented to J. Howard under false pretenses." ER 61. Once again, there is no evidence to support these conclusions.

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[36] The District Court stated that the private annuity transaction must have been a sham because, at the time J. Howard entered into it, he had "terminal" cancer and, thus, would not live to see any of the payments. Although J. Howard had a cancerous growth, it did not kill him. ER 5339. J. Howard ultimately died of heart failure. The court likewise stated that it did not believe that MPI would have been able to make the annuity payments because it had already exhausted its $15 million line of credit. ER 59-60 n.39. The evidence, however, is that MPI could not use its line of credit to pay for J. Howard's personal expenditures. MPI, however, may well have been able to borrow additional funds for the business purpose of repurchasing its stock.

First, the court cites no example of any document destruction. Second, there is no evidence of any backdating by anyone, let alone Pierce. On January 13, 1994, J. Howard transferred his interest in the GRAT to the Living Trust. ER 3300-01. The court concluded that this document was backdated because a time entry indicated that one of Hunter's associates worked on a donation of an interest in the GRAT on July 12, 1994. ER 62. The GRAT provided a stream of income to the Living Trust. On occasion, J. Howard would assign portions of his various income streams as gifts, and the time entry likely referred to such a transaction. Certainly, the time entry is not evidence of backdating, and the court's conclusion is entirely speculative. Further, as discussed above, there is no evidence of any backdating of the June 1 Note.

Third, there is no evidence that Pierce altered any document. The District Court determined that Hunter changed the terms of the GRAT. ER 43, 61-62. Sorensen questioned the change, and J. Howard executed an affidavit stating that the change was made at his direction. ER 4960-61. Similarly, as discussed above, there is no evidence that Pierce altered the Living Trust.

Fourth, there is no evidence that Pierce prepared or presented any document to J. Howard under false pretenses. The District Court criticized J. Howard's sale of MPI shares in 1995 in exchange for the private annuity. The only evidence, however, is that this was done at J. Howard's instruction and that he understood what he was doing. There is no evidence that anyone (let alone Pierce) misled J. Howard.

C. There Is No Evidence that Vickie Has Suffered any Damages.

The District Court based its conclusion that J. Howard intended to give Vickie a gift primarily on the New Community Memo. As explained above, this memo contained a formula to be used to calculate the option that was tied to increases in the dividends paid on MPI's Koch stock and prevailing interest rates. The only evidence is that, under this formula, Vickie would be entitled to little or nothing because the formula did not generate a significant benefit. ER 5113-17, 5536-37.

Ignoring the formula, the District Court simply created a gift that it felt would be appropriate, and concluded that the appropriate measure of the gift was the alleged estimated increase in the "book" value of MPI's Koch stock during the marriage. ER 78-79. There is no evidence, however, that J. Howard ever intended to give Vickie (or anyone else) a gift based on the book value of the Koch stock. Accordingly, the court's selection of this measure was entirely arbitrary.

Moreover, in conducting its valuation, the court relied on inadmissible evidence. Rejecting all of the expert testimony, the court based its conclusion on hearsay valuations expressed in internal bank presentations at the Texas Commerce Bank. ER 78-79. This was error. The bankers who made the presentations never testified, *were* not qualified as expert witnesses, and were never subject to cross-examination. The view of J. Howard's bankers regarding the "book" value of the Koch stock was classic hearsay and completely inadmissible to establish the "truth" of the value of any Koch shares or their appreciation. Fed. R. Evid. 801 & 802. In addition to being clearly

erroneous, the District Court's consideration of the statements of J. Howard's bankers was also plain error. *See* Fed. R. Evid. 103(d).

* * *

ORAL HEARING IN SAN FRANCISCO

In Re:	:	October 9, 2003
MARSHALL/SMITH 801921-109132	:	

ORAL HEARING

Before: BEEZER, KLEINFELD, PAEZ, CJJ

(Transcription from Tape Recording)

BRANDON REPORTING SERVICE
44 Capitol Avenue
Hartford, CT 06103
860.549.1850

APPEARANCES:

For Pierce Marshall:
ERIC BRUNSTAD, JR., ESQ.

For Vickie Lynn Marshall:
KENT RICHLAND, ESQ.

* * *

[54] THE COURT: When you use the term "gift," you're including the element of delivery? Did he ever deliver anything to her that he intended to deliver to her?

MR. RICHLAND: He intended to and –

THE COURT: He never did, did he?

MR. RICHLAND: In this respect he didn't – well, what we do not know is, we do not know if there was ever a finalization of the catch-all trust which – because it was missing. Why was it missing? Because it was never

produced. Why wasn't it ever produced? Because Pierce didn't produce it as was found by the bankruptcy court. It was suppressed or destroyed.

Now, certainly she can't be blamed for the fact that the central document in the [35] case doesn't exist –

THE COURT: There are judgments against Pierce individually.

MR. RICHLAND: That's correct.

THE COURT: Did you prove that he tore it up or that he sequestered it?

MR. RICHLAND: The bankruptcy found as a matter of fact that he did. In fact, it was in the control of his lawyer and other documents were produced, including –

THE COURT: That part of the discovery sanctions?

MR. RICHLAND: That was part of the discovery sanctions, yes.

THE COURT: It wasn't proof in the – I can't go to read the testimony, it's something the bankruptcy judge made up, right?

MR. RICHLAND: No, he certainly didn't make it up. He took –

THE COURT: No, I mean he – that's what he put in his order, right? And there's something in the record to support that?

MR. RICHLAND: Absolutely.

THE COURT: I thought all there was in the record to support that is that he was [36] dissatisfied with the son's compliance with discovery and he therefore entered findings of fact against the son on every contested point without evidence.

MR. RICHLAND: Judge Bufford repeatedly over a lengthy period of time required the documents be produced. It was repeatedly –

THE COURT: You're not responding to my question. Was there evidence or was there merely a failure to comply with discovery orders?

MR. RICHLAND: The evidence was the failure to comply with discovery orders notwithstanding the numerous opportunities to –

THE COURT: Did anyone testify he destroyed the documents or I destroyed them at his direction?

MR. RICHLAND: The document was not produced. Perhaps it was suppressed. Perhaps? Who knows.

THE COURT: It's tricky asking you questions.

MR. RICHLAND: I'm sorry, your Honor. I don't know who – if your question is was there evidence –

THE COURT: I'm trying to find out [37] was there testimony that established that the documents were destroyed or was the finding of fact that the documents were destroyed entered as a discovery sanction. I thought it was entered as a discovery sanction and I wanted to make sure that that was right –

MR. RICHLAND: Yes. That is correct.

THE COURT: Now I'm getting all confused.

MR. RICHLAND: I apologize that I didn't catch the distinction you were making. It was entered as a discovery sanction because – because the bankruptcy court found, as a matter of fact, that it either was suppressed or destroyed. It was not produced either in the district court as well, despite the fact that it was about 400 boxes of documents that were produced, somehow this one was missing as well.

THE COURT: As I recall from the record the district court ultimately set aside the discovery sanctions.

MR. RICHLAND: The district court reversed the discovery sanction – excuse me.

THE COURT: No, I was just going to say, so is no such fact even established by the [38] bankruptcy courts unless sanctions –

MR. RICHLAND: It was remanded to the bankruptcy court and the bankruptcy court then did reaffirm the basis for the sanctions.

The problem is that this was of course the central document in the case. This was the document which was to form the basis of the gift, and its absence put a huge gap in things. But you know what, even setting that aside, what we know is that the district court did a de novo review of this case and concluded that in fact this document would have been the embodiment of the gift that was intended to be given.

On that basis it seems to me that there is just – you know, it is in some ways immaterial what the bankruptcy court found or the basis for the bankruptcy court –

THE COURT: When was the gift to be delivered?

MR. RICHLAND: Well, we do not know. What we know is that it was the –

THE COURT: How do we know we have a gift, and if we don't have the three elements supporting a gift we don't have a gift. So why [39] do you keep talking about a gift –

MR. RICHLAND: What we know is –

THE COURT: – if it's not been made in this case?

MR. RICHLAND: It was not a gift. What we know is that there was –

THE COURT: All right. You don't have a gift.

* * *

[63] THE COURT: Thank you, Counsel.

MR. BRUNSTAD: Briefly, your Honor. Howard kept all of his assets in the living trust. There was no other source for the funding of any alleged gift to Vickie. It had to come from somewhere. If it didn't come from there, there was no other place for it to come from.

By validating the living trust, again, the probate court decided who had a legitimate expectancy to J. Howard's assets and who did not, thereby precluding her tort claim.

King vs. Acker is completely distinguishable from this case. In that situation there was a written signed prior will which the probate court considered and determined that that was the valid instrument. Here there's no evidence of a gift, there's no signed document. The only

testimony in the record is that a catch-all trust was never prepared, the only evidence in the record is that the catch-all trust never existed. The reference to a term, "trust," is simply to a word "trust" appearing in a billing record but relates to work performed for Companie Victoire. There's no evidence that the word "trust" in that billing record had [64] anything to do with a supposed catch-all trust or gift to Vickie. The evidence just isn't there.

THE COURT: It had to do with the conduct of Vickie's business though, isn't that right?

MR. BRUNSTAD: It had to do with a corporation that J. Howard created and actually gave to Vickie as he intended. The only evidence in the record is that the word "trust" in the billing record related to a potential voting trust that was thought of to be – to protect Vickie and to control the corporation. There's no evidence that that word, "trust," has anything to do with a catch-all trust.

But apart from all of that there is absolutely no evidence, no testimony, no document, no nothing, that Pierce ever saw a catch-all trust, ever suppressed a catch-all trust, ever tore up a catch-all trust, or did anything of the kind.

* * *

CERTIFICATE

I hereby certify that the foregoing 71 pages are a complete and accurate transcription to the best of my ability of the electronic sound recording of the Oral Hearing in re: Marshall vs. Marshall, 02-56002, 02-56067, 02656603, held in San Francisco, California, on October 9, 2003.

/s/ [John C. Brandon] — 11-10-03

Signature of Transcriber — Date